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TRANSCRIPT OF RECORD

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S. C.

Supreme Court of the United States

OCTOBER TERM, 1936

No. 398

FOUNDERS GENERAL CORPORATION,
PETITIONER,

vs.

JAMES J. HOEY, COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1936.

CERTIORARI GRANTED NOVEMBER 9, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 398

FOUNDERS GENERAL CORPORATION,
PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 28, 1936.
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United States Circuit Court of Appeals

for the Second Circuit

FOUNDERS GENERAL CORPORATION,
Plaintiff-Appellant,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant-Appellee.

Statement Under Rule XIII

This is an appeal from an order dated September 22, 1935, of Hon. Henry W. Goddard, Judge of the United States District Court for the Southern District of New York, which order and the judgment thereon were entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 25th and 28th days of September, 1935, respectively, which said order and judgment dismissed the complaint of the plaintiff-appellant herein.

Leave to appeal from said order and judgment of the District Court was granted by Hon. Henry W. Goddard by order dated October 23, 1935.

4 **Summons**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of
5 the State of New York,
Defendant.

L 59—p. 320

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of
6 the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 28th day of November A. D. 1934.

CHARLES WEISER,
Clerk.

(Seal)

SEIBERT & RIGGS,
Plaintiff's Attorney,
Office and Post Office Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

Complaint

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

Founders General Corporation, the plaintiff herein, complaining of the defendant by Seibert & Riggs, its attorneys, respectfully shows and alleges as follows:

1. At all times hereinafter mentioned the plaintiff was and now is a corporation duly organized under the laws of the State of Maryland.

2. Defendant is the United States Collector of Internal Revenue for the Second District of the State of New York.

3. On September 10, 1929, plaintiff entered into a written agreement with United States Electric Power Corporation, a Maryland corporation, whereby plaintiff agreed on certain con-

10 ditions not here material to subscribe for one hundred thousand (100,000) shares of common stock of United States Electric Power Corporation, at a price of $13.50 per share, each share to be accompanied by a warrant entitling the holder to subscribe for one additional share of such common stock at the rate of $25.00 per share before January 2, 1940. The closing of the aforesaid transaction by delivery of the stock with warrants attached and the payment therefor was set at 12 o'clock noon September 11 17, 1929.

4. Subsequent to the aforesaid subscription, but prior to the time set for delivery above stated, plaintiff directed United States Electric Power Corporation to issue a certificate or certificates representing such one hundred thousand (100,000) shares, with warrants attached, of common stock of United States Electric Power Corporation in the name of Benton & Co., plaintiff's nominee.

12 5. Attached hereto, made a part hereof and marked "Exhibit A" is a photostat copy of an agreement made and entered into March 31, 1928, between Frank D. Erwin, Dean J. Almy, and Thomas H. Benton, under the terms of which said individuals formed a partnership the name of which was Benton & Co., the purpose of which was to enter into a contract with plaintiff, which was duly entered into by and between Benton & Co. and Plaintiff, a photostat copy of which contract is annexed hereto, made a part hereof and marked "Exhibit B."

6. On September 16, 1929 United States Electric Power Corporation pursuant to the direc-

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tion of the plaintiff hereinbefore in paragraph number 4 alleged, directed The Equitable Trust Company of New York, then transfer agent for its common stock, to make out one certificate in the name of the said Benton & Co. representing one hundred thousand (100,000) shares of its common stock, with a warrant attached, entitling the owner of such certificate to subscribe for an additional one hundred thousand (100,000) shares of such common stock, and cause the same to be countersigned by itself as transfer agent and registered by Chemical Bank & Trust Company, the registrar for said common stock, and when so made out, countersigned and registered, to be delivered to an officer of United States Electric Power Corporation duly authorized to receive the same.

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7. Thereafter said certificate, being a certificate of original issue, was duly registered on the books of the transfer agent of United States Electric Power Corporation in the name of Benton & Co., and delivered to an officer of United States Electric Power Corporation duly authorized to receive said certificate, pursuant to the aforesaid direction.

15

8. On September 17, 1929, pursuant to the agreement hereinabove in paragraph 3 hereof alleged, between United States Electric Power Corporation and plaintiff, United States Electric Power Corporation duly delivered said certificate for one hundred thousand (100,000) shares, with warrant attached as aforesaid, registered in the name of Benton & Co., to the plaintiff herein, and plaintiff paid United States Electric Power Corporation the amount subscribed, being the

16 consideration for such one hundred thousand (100,000) shares, together with the right to subscribe for an additional one hundred thousand (100,000) shares of said stock of United States Electric Power Corporation, all evidenced by said certificate with warrant attached.

9. The documentary stamp tax upon the original issue of said one hundred thousand (100,000) shares of common stock, with warrants attached, was duly paid by United States Electric Power
17 Corporation on the 17th day of September, 1929.

10. As to all or any part of the said one hundred thousand (100,000) shares of common stock, with warrants which have at any time been transferred out of the name of Benton & Co., the stock transfer tax imposed thereon by the Government of the United States has been duly paid.

11. In addition to the aforesaid documentary stamp tax on original issue, and the aforesaid
18 transfer tax in cases where the said stock and warrants have been transferred out of the name of Benton & Co., the defendant after notice and demand duly given to plaintiff, on the 22nd day of October, 1934, has illegally, erroneously and wrongfully collected from the plaintiff the sum of $4,733.33 as a tax with penalty and interest upon the alleged transfer by plaintiff to Benton & Co. of legal title to said stock or of the right to receive the same, and the said amount was on the 22nd day of October, 1934, paid to the defendant by plaintiff under protest.

12. Upon information and belief, the grounds upon which the assessment of the tax with pen-

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alty and interest of $4,733.33 aforesaid was made and the notice and demand for payment given are that by the designation of Benton & Co. as the nominee of plaintiff and by the issuance of the certificate (with warrant) in the name of Benton & Co. as aforesaid, a tax liability was incurred under the provisions of Schedule A-3, Title VIII of the Revenue Act of 1926. Plaintiff believes and therefore alleges that the assertion and assessment of the tax herein as aforesaid are contrary to the decision of the United States District Court for the Western District 20 of Pennsylvania in *Union Trust Company* v. *Heiner*, 26 Fed. (2d) 391, upon which plaintiff relied in failing to pay a tax upon the alleged transfer.

13. Thereafter, on the 26th day of October, 1934, plaintiff did make and file with the defendant a claim for refund of said tax, penalty and interest of $4,733.33, and thereby duly took an appeal to the Commissioner of Internal Revenue and demanded repayment of said amount in accordance with law and the regulations and 21 rules of the Treasury Department. A true copy of said claim for refund, omitting Exhibits "A" and "B" thereto which are attached as Exhibits "A" and "B" to this petition, is hereby annexed, made a part hereof, and marked "Exhibit C."

14. Thereafter, on the 20th day of November 1934, the Commissioner of Internal Revenue rejected said claim for refund of said tax, penalty and interest and disallowed said appeal.

22 *Complaint*

15. No part of the said sum of $4,733.33 illegally and without warrant or authority of law demanded and collected by the defendant from the plaintiff as aforesaid has been repaid to the plaintiff and the whole amount thereof with interest thereon from October 22, 1934 remains due and owing from the defendant to the plaintiff.

16. This is a suit of a civil nature at common law arising under the constitution and laws of the United States and under the laws of the
23 United States providing for internal revenue, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of $4,733.33, with interest thereon from October 22, 1934, together with the costs and disbursements of this action.

SEIBERT & RIGGS.

Dated, New York, November 26, 1934.

24

SEIBERT & RIGGS,
Attorneys for Plaintiff,
Office & Post Office Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

R. E. T. RIGGS,
MURRAY TAYLOR,
HENRY J. RICHARDSON,
Of Counsel.

Exhibit A, Annexed to Complaint

25

EXHIBIT A

AGREEMENT made this 31st day of March, 1928, between

FRANK B. ERWIN
DEAN J. ALMY
THOMAS H. BENTON

WITNESSETH:

That the undersigned, being desirous of forming a general partnership for the purposes and upon the terms and conditions hereinafter stated, 26 have agreed and do hereby agree as follows:

(1) There is hereby formed a general partnership consisting of the undersigned as members of the firm and such other person or persons as from time to time by mutual consent of the undersigned may be admitted to membership therein.

(2) The name of the partnership is

BENTON & Co.

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(3) The purpose of the partnership is to enter into a contract with Founders General Corporation, a Maryland corporation, having an office at 50 Pine Street, Borough of Manhattan, City, County and State of New York, upon such terms as to consideration and otherwise as may be expressed in said contract, for the transaction of the business hereinafter mentioned.

(4) The business of the partnership shall be, and is hereby limited to, the holding in the firm name of stocks, bonds, notes and other securities

and property as agent (other than commission agent or broker) for the account of Founders General Corporation having an office at No. 50 Pine Street, Borough of Manhattan, City, County and State of New York; and otherwise acting with respect thereto in accordance, but only in accordance with written instructions of Founders General Corporation signed by one of its Vice-Presidents. The partnership shall not buy, sell, own, hold, borrow, pledge, or otherwise in any manner deal with or in any stocks, bonds, notes or other securities or property for the individual account of the firm or for the account of anyone other than Founders General Corporation, or buy, sell, borrow, pledge or otherwise in any manner deal with or in any stocks, bonds, notes, or other securities or property for the account of Founders General Corporation except pursuant to its written orders, signed as aforesaid, nor shall any member of the partnership do any of the foregoing acts for the individual account of the firm.

(5) The partnership is to continue until terminated by mutual agreement of the partners or until dissolved by the death or withdrawal of any partner.

(6) The partnership shall not have any capital.

(7) Neither the partnership nor any member thereof shall have or claim any beneficial interest whatsoever in any stocks, bonds, notes or other securities and property at any time held by the partnership, except any sums which may be

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paid or payable to the partnership as compensation pursuant to the terms of the above mentioned contract; and in the event of the death of any partner or partners during the continuance of the partnership, the estate of such deceased partner or partners shall have no interest in any of such items, except as aforesaid, nor in the partnership name, nor shall the legal representatives of such deceased partner or partners have any rights therein or thereto as a general partner or otherwise. All right, title, equity, interest, lien, claim and demand whatsoever in and 32 to any stocks, bonds, notes, and other securities and property at any time held or received or receivable by the partnership, except sums representing compensation paid or payable to the partnership pursuant to the terms of the above mentioned contract are hereby irrevocably waived and disclaimed.

(8) No partner shall at any time sign the partnership name for the purpose of creating any indebtedness except as herein otherwise provided.

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(9) For the purpose of transferring securities registered in the name of the partnership, the signatures of all the partners shall be necessary, except where the partnership signature is guaranteed by American Founders Trust or Founders General Corporation, in which case the firm name may be signed by any one partner or any attorney appointed by the partnership in a writing signed by all of the partners, or, in case of dissolution, by the surviving partners.

34 *Exhibit A, Annexed to Complaint*

(10) Any partner may withdraw from the partnership at any time by giving ten (10) days' notice in writing to the other partners of his intention so to do. In any such case the withdrawing partner shall have no further interest in the partnership assets or the partnership name. The termination of any partner's employment by Founders General Corporation howsoever caused, shall operate as a withdrawal from the partnership. Such withdrawal shall be effective on the
35 date of such termination of employment.

(11) Upon the termination of the partnership or the earlier dissolution thereof by the death or withdrawal of a partner, the surviving partner or partners, if they so elect, shall have the sole and exclusive right to retain and use the partnership name and good will and to do business as a new partnership thereunder and therewith; and, if they so elect but not otherwise, shall also succeed to all right, title and interest of the terminated or dissolved partnership in and to all
36 stocks, bond, notes and other securities and property held in its name.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals the day and year first above written.

FRANK B. ERWIN (L. S.
T. H. BENTON (L. S.
DEAN J. ALMY (L. S.

Exhibit B, Annexed to Complaint

State of New York, }
County of New York, } ss.:

On this 31st day of March, 1928, before me personally came FRANK B. ERWIN, DEAN J. ALMY and THOMAS H. BENTON, to me known to be the persons described in and who executed the foregoing instrument, and they duly severally acknowledged to me that they executed the same.

FRANK J. KILLIE
Commissioner of Deeds
City of New York
N. Y. Co. Clerk's No. 179
Term Expires May 17, 1929.

—

EXHIBIT B

AGREEMENT made and entered this 31st day of March, 1928, by and between FOUNDERS GENERAL CORPORATION, a Maryland corporation, having an office at No. 50 Pine Street, Borough of Manhattan, City, County and State of New York, (hereinafter called "the Corporation") of the first part.

And FRANK B. ERWIN, DEAN J. ALMY and THOMAS H. BENTON, individually and as members of the firm of BENTON & Co., a partnership having an office at No. 50 Pine Street, Borough of Manhattan, City, County and State of New York (hereinafter called "the Partnership"), of the second part.

Exhibit B, Annexed to Complaint

40 WHEREAS, Founders General Corporation desires to appoint and employ an agent for the limited purpose and with the limited authority hereinafter expressed and the partnership is willing to accept such appointment and employment upon the terms and conditions hereinafter stated.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

41 That in consideration of the premises and of the mutual promises herein contained, the parties hereto have agreed and do hereby agree respectively as follows:

(1) The Corporation hereby appoints and employs the Partnership as its agent, to serve as such until the appointment and authority hereby conferred shall be revoked, for the limited purpose of holding in the firm name stocks, bonds, notes, and other securities and property as agent (other than commission agent or broker) for the account of the Corporation and of otherwise act-
42 ing with respect thereto in accordance, but only in accordance with the written instructions of the Corporation signed by one of its Vice-Presidents with power and authority limited to holding such items in the firm name and otherwise acting with respect thereto as herein provided.

(2) The Corporation shall pay the Partnership for its services as agent as aforesaid at the rate of $1500.00 per annum.

(3) The Partnership hereby accepts such appointment and employment upon the terms and conditions herein stated and at all times will

faithfully and promptly carry out, perform and observe the instructions of the Corporation in regard to the holding or otherwise acting with respect to stocks, bonds, notes and other securities and property. 43

(4) The Partnership will not buy, sell, own, hold, borrow, pledge, or otherwise in any manner deal with or in any stocks, bonds, notes, or other securities or property, for the individual account of said firm, or for the account of any one other than the Corporation, or buy, sell, borrow, pledge, or otherwise in any manner deal with or in any stocks, bonds, notes or other securities or property for the account of the Corporation except as herein provided, nor will any member of the Partnership do any of the foregoing acts for the individual account of said firm. 44

(5) Neither the Partnership nor any member thereof shall have or claim any beneficial interest whatsoever in any stocks, bonds, notes or other securities and property, at any time held by the Partnership except any sums which may be paid or payable to the Partnership as compensation pursuant to the terms of this agreement; and in the event of the death of any partner or partners during the continuance of the partnership, the estate of such deceased partner or partners shall have no interest in any of such items, except as aforesaid, nor in the partnership name, nor shall the legal representatives of such deceased partner or partners have any rights therein or thereto as a general partner or otherwise. All right, title, equity, interest, lien, claim and demand whatsoever in and to any stocks, bonds, notes and other securities and 45

46 property at any time held or received or receivable by the partnership, except sums representing compensation paid or payable to said firm by the Corporation pursuant to the terms of this agreement, are hereby irrevocably waived and disclaimed by said firm and each and every member thereof.

Promptly upon request of the Corporation, the Partnership and the several members thereof will, from time to time, execute and deliver all such assignments, powers of attorneys, dividend
47 orders, proxies, waivers, declarations of trust, disclaimers and other instruments, general or specific, as may be presented by the Corporation for that purpose with respect to any stocks, bonds, notes and other securities and property that may now or hereafter be registered in the name of the Partnership or be received or receivable by the Partnership, and will endorse and deliver to the Corporation all cheques, drafts and orders for the payment of money that may be received by the Partnership or any member thereof, relating to any such item. The Corpo-
48 ration is hereby constituted and appointed the true and lawful agent and attorney of the Partnership, with full power and authority irrevocable to sell, assign, endorse, transfer and deliver all stocks, bonds, cheques, notes and other securities and property now or hereafter at any time standing in the name of the Partnership or in its possession, and to execute and deliver all such instruments as may be necessary or proper for that purpose, with full power of substitution.

(4) For the purpose of transferring securities registered in the name of the Partnership, the

signatures of all of the partners shall be necessary except where the partnership signature is guaranteed by the American Founders Trust or Founders General Corporation, in which case the firm name may be signed by any one partner or any attorney appointed by the partnership in a writing signed by all of the partners, or in the case of dissolution, by the surviving partners.

(5) The Corporation will at all times protect and indemnify the partnership and each of the several members thereof against, and save them and each of them harmless of and from, any and all costs, expenses, damages, claims, demands and liabilities of whatsoever kind or character that may arise out of this agreement or the performance thereof, or may be incurred with respect to any stocks, bonds, notes and other securities and property at any time dealt with hereunder or with respect to any transactions concerning any such items which may be ordered or directed by the Corporation, save and except only such costs, expenses, damages, claims, demands, and liabilities, if any, as may arise or be imposed upon any member of the partnership by reason of the wrongful acts, misconduct or neglect of such member.

(6) This agreement shall inure to the benefit of and shall bind the parties hereto and their respective successors, legal representatives and assigns.

IN WITNESS WHEREOF the Corporation has caused this agreement to be executed by one of its Vice-Presidents and its corporate seal to be

hereunto affixed and attested by an assistant secretary, and the several individual parties of the second part hereto have hereunto set their respective hands and seals, all as of the day and year first above written.

FOUNDERS GENERAL CORPORATION,

By DEAN J. ALMY
Vice-President

FRANK B. ERWIN
T. H. BENTON DEAN J. ALMY
Individually and as Members of the Firm of BENTON & Co.

Attest:

E. MACBRIDE
Assistant Secretary

State of New York, }
County of New York, } ss.:

On this 31st day of March, 1928, before me came Dean J. Almy to me known, who being by me duly sworn, did depose and say that he resides in Orange, N. J., that he is a vice-president of FOUNDERS GENERAL CORPORATION, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name thereto by like order.

FRANK J. KILLIE,
Commissioner of Deeds
City of New York
Term Expires May 17, 1929

Exhibit B, Annexed to Complaint

State of New York, }
County of New York, } ss.:

On this 31st day of March, 1928, before me came FRANK B. ERWIN, DEAN J. ALMY and THOMAS H. BENTON, to me known to me to be the persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

FRANK J. KILLIE
Commissioner of Deeds,
City of New York.

State of New York, }
County of New York, } ss.:

On this 31st day of March, 1928, personally appeared before me FRANK B. ERWIN, DEAN J. ALMY and THOMAS J. BENTON, personally known to me to be the members of the firm of BENTON & Co., to me known to be the persons described in and who executed the foregoing instrument in the firm name of BENTON & Co., and they duly acknowledged that they executed the same as their act and deed of said firm of BENTON & Co., for the uses and purposes therein mentioned.

FRANK J. KILLIE
Commissioner of Deeds
City of New York

58 *Exhibit C, Annexed to Complaint*

EXHIBIT C

C L A I M

To Be Filed with the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

59 [x] Refund of Tax Illegally Collected.
[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
[ ] Abatement of Tax Assessed (not applicable to estate or income taxes).

State of New York, }
County of New York, } ss.:

Name of taxpayer or purchaser of stamps—Founders General Corporation
Business address—#1 Exchange Place, Jersey
60 City, New Jersey
Residence——

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed —Second District of New York

2. Period (if for income tax, make separate form for each taxable year) from ——, 19——, to ——, 19——

3. Character of assessment or tax—Stock Transfer Stamp Tax

4. Amount of assessment, $4,733 33/100; dates of payment October 22nd, 1934.

Exhibit C, Annexed to Complaint 61

5. Date stamps were purchased from the Government——

6. Amount to be refunded—$4,733 33/100

7. Amount to be abated (not applicable to income or estate taxes)—— $——

8. The time within which this claim may be legally filed expires, under Section —— of the Revenue Act of 19—— on ——, 19——

The deponent verily believes that this claim should be allowed for the following reasons: 62

Claimant, Founders General Corporation, is a corporation organized under the laws of the State of Maryland, with its principal address and place of business at 1 Exchange Place, Jersey City, New Jersey.

On September 10th, 1929 claimant entered into a written agreement with United States Electric Power Corporation, a Maryland corporation, whereby claimant agreed, on certain conditions not here material, to subscribe for one hundred thousand (100,000) shares of Common Stock of United States Electric Power Corporation 63 at a price of $13.50 per share, each share to be accompanied by a warrant entitling the holder to subscribe for one additional share of such Common Stock at the rate of $25 per share before Janaury 2, 1940. The closing of the aforesaid transaction by delivery of the stock, with warrants attached, and the payment therefor was set at 12 o'clock noon September 17th, 1929.

Subsequent to the aforesaid subscription, but prior to the time set for delivery above stated, the claimant directed United States Electric Power Corporation to issue a certificate or certificates representing such one hundred thousand

64 (100,000) shares, with warrants attached, of Common Stock of United States Electric Power Corporation in the name of Benton & Co., claimant's nominee.

Attached hereto, made a part hereof, and marked "Exhibit A" is a photostat copy of an agreement made and entered into March 31st, 1928 between Frank B. Erwin, Dean J. Almy and Thomas H. Benton, under the terms of which said individuals formed a partnership, the name of which was Benton & Co., the purpose
65 of which was to enter into a contract with claimant, which was duly entered into by and between Benton & Co. and claimant, a photostat copy of which contract is annexed hereto, made a part hereof, and marked "Exhibit B."

On September 16th, 1929 United States Electric Power Corporation pursuant to the direction of the claimant hereinbefore alleged, directed The Equitable Trust Company of New York, then the transfer agent for its Common Stock, to make out one certificate in the name of said
66 Benton & Co. representing one hundred thousand (100,000) shares of its Common Stock, with a warrant attached entitling the owner of such certificate to subscribe for an additional one hundred thousand (100,000) shares of said Common Stock, and cause the same to be countersigned by itself as transfer agent, and registered by Chemical Bank & Trust Company, the registrar for said Common Stock, and when so made out, countersigned and registered, to be delivered to an officer of United States Electric Power Corporation duly authorized to receive the same.

Thereafter said certificate, being a certificate of original issue, was duly registered on the

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books of the transfer agent of United States Electric Power Corporation in the name of Benton & Co., and delivered to an officer of United States Electric Power Corporation duly authorized to receive said certificate pursuant to the aforesaid direction.

On September 17th, 1929, pursuant to the agreement hereinabove alleged between United States Electric Power Corporation and claimant, United States Electric Power Corporation duly delivered said certificate for one hundred thousand (100,000) shares, with warrant attached as 68
aforesaid, registered in the name of Benton & Co., to the claimant herein, and claimant paid to United States Electric Power Corporation the amount subscribed, being the consideration for such one hundred thousand (100,000) shares, together with the right to subscribe for an additional one hundred thousand (100,000) shares of said stock of United States Electric Power Corporation, all evidenced by said certificate with warrant attached.

The documentary stamp tax upon the original issue of said one hundred thousand (100,000) 69
shares of Common Stock was duly paid by United States Electric Power Corporation on the 17th day of September, 1929.

As to all or any part of the said one hundred thousand (100,000) shares of Common Stock, with warrants, which have at any time been transferred out of the name of Benton & Co., the stock transfer tax imposed thereon by the Government of the United States has been duly paid.

In addition to the aforesaid documentary stamp tax on original issue, and the aforesaid docu-

70 mentary stamp tax on original issue, and the aforesaid transfer tax in cases where the said stock and warrants have been transferred out of the name of Benton & Co., the Collector of the United States Internal Revenue for the Second District of the State of New York, after notice and demand duly given to claimant on October 22nd, 1934, has illegally collected from the claimant the sum of Four Thousand Seven Hundred Thirty-three and 33/100 ($4,733.33/100) Dollars as a tax upon the alleged transfer by claimant
71 to Benton & Co. of legal title to said stock, or of the right to receive the same, and the said amount was, on the 22nd day of October, 1934, paid to said Collector by claimant under protest.

Upon information and belief, the grounds upon which the assessment of the said tax was made, and the notice and demand for payment given, are that by the designation of Benton & Co. as the nominee of claimant, and by the issuance of the certificate (with warrant) in the name of Benton & Co. as aforesaid, a tax liability was incurred under the provisions of Sched-
72 ule A-3, Title VIII, of the Revenue Act of 1926. Claimant alleges that the assertion and assessment of said tax herein, as aforesaid, are contrary to the decision of the United States District Court for the Western District of Pennsylvania in *Union Trust Company* against *Heiner,* 26 Fed. (2nd) 391, upon which claimant relied in failing to pay a tax upon the alleged transfer at the time the stock was issued as aforesaid.

Signed—FOUNDERS GENERAL CORP.
E S GLINES

Sworn to and subscribed before me this
26th day of October, 1934.

JOHN P. DICKE
(Notarial Seal)

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Notice of Motion for Judgment Dismissing the Complaint Pursuant to Rule 106 of the Rules of Civil Practice of the Supreme Court of the State of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against

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JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

(L 59—320)

SIRS:

PLEASE TAKE NOTICE that on the complaint in this action the defendant will move this Court at a term thereof for motions, to be held on the 9th day of July, 1935, at Room 235, of the Old Post Office Building, in the Borough of Manhattan, City of New York, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the plaintiff's complaint and for judgment thereon, pursuant to Section 280 of the New York State Civil Practice Act, and Rule 106 of the Rules of Civil Practice of the Supreme Court of the State of New York, on the grounds that the plaintiff's complaint does not state facts

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sufficient to constitute a cause of action and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N .Y., July 2, 1935.

Yours, etc.,

F. W. H. ADAMS,
United States Attorney for the
Southern District of New York,
77 Attorney for the Defendant,
Office and Post Office Address,
U. S. Courts and P. O. Building,
Borough of Manhattan,
City of New York.

To:

SEIBERT & RIGGS, Esqs.,
Attorneys for the Plaintiff,
2 Rector Street,
New York City.

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Opinion of Goddard, *U. S. D. J.* 79

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.
L59—320

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GODDARD, District Judge:

This motion, equivalent to a demurrer, raises the question whether the facts alleged in the complaint disclose a transaction subject to the documentary stamp tax which was assessed and collected from the plaintiff under Schedule A(3) of Section 800 of the Revenue Act of 1926. The facts alleged may be summarized as follows: 81

On September 10, 1929 plaintiff made a written agreement with an electric power corporation, hereinafter referred to as the issuing corporation, to subscribe at the price of $13.50 per share for 100,000 shares of the issuing corporation's common stock, each share to be accompanied by a warrant entitling the holder to subscribe for one additional share of such common stock before January 2, 1940 at the fixed price of $25 per share. The shares, with accompanying

82 warrants, were to be delivered and payment therefor was to be made on September 17, 1929. Before the time set for delivery, the plaintiff directed the issuing corporation to have the certificate representing the said 100,000 shares of stock with accompanying warrants, made out in the name of the plaintiff's nominee, Benton & Company. This was done, and on September 17, 1929 such certificate was delivered to the plaintiff upon payment by it of the agreed subscription price. The documentary stamp tax upon
83 the original issue of said 100,000 shares of stock and accompanying warrants, was duly paid by the issuing corporation, and stock transfer taxes have been duly paid as to all shares and warrants which have been transferred out of the name of Benton & Company. In addition, the taxing authorities demanded from the plaintiff, and on October 22, 1934, collected the sum of $4,733.33 as a tax, with penalty and interest, upon the alleged transfer by the plaintiff to its nominee, Benton & Company, because of the plaintiff's
84 direction for issuance of the aforesaid certificate in the latter's name.

Benton & Company is a partnership, whose sole business is to hold in the firm's name stocks, bonds and other securities belonging to the plaintiff, and to transfer them at the plaintiff's request. Neither the firm nor any partner has any beneficial interest in the property so held. The firm receives from the plaintiff an annual fee of $1500 for acting as such agent.

Contending that the tax so collected from it was illegal, the plaintiff filed a claim for a refund and upon its rejection brought this suit.

85

The defendant's motion to dismiss squarely raises the question whether the nomination by the plaintiff or Benton & Company as the person in whose name the certificate should be made out is subject to tax under the statute in question.

Section 800 of the Revenue Act of 1926 provides that

> "On and after the expiration of thirty days after the enactment of this act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures 86
> or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this title * * * the several taxes specified in such schedule."

Schedule A(3) reads as follows:

> "3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock * * * or to rights to 87
> subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share; * * *."

88 Regulation 71 relating to stamp taxes on documents imposed by the Revenue Act of 1926, and the Revenue Act of 1928 contain the following provisions:

> "Art. 31. Basis of Tax. Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale * * * or delivery of or transfer of the legal title to shares, or certificates of stock
> 89 * * * or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificates, or agreement or memorandum of sale."

> "Art. 34. Sales and Transfers Subject to Tax. The following transactions are subject to the tax:

> (a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits or of interest in property or
> 90 accumulations in corporations, joint-stock companies, or associations.

> (b) The sale or transfer of shares of stock, whether or [illegible] represented by certificates.

> (c) The transfer of stock to or by trustees.

> * * * * * *

> (g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants. 91

* * * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock." 92

"Art. 77. FURTHER DEFINITIONS. (I) When used in these regulations:

(b) The term 'issue' includes not only actual delivery of, but also acceptance of subscriptions to shares or certificates of stock * * *."

"Art. 85. AFFIXING AND CANCELLATION OF STAMPS. (a) In the case of the issue of shares of stock, whether on organization or reorganization, the stamps representing the tax shall be affixed to the stock books and not to the certificates issued." 93

From the foregoing excerpts it is apparent that the statutory basis of taxation is very broad and that the regulations have been drafted in equally inclusive terms. With certain express exceptions, not now material, a tax is laid upon every transfer of the legal title to shares or certificates of stock, or to rights to subscribe for or receive such shares or certificates, whether or not the transferee acquires any beneficial interest.

94 If the issuing corporation had issued the shares subscribed for to the plaintiff and the latter had then transferred them to its agent, Benton & Company, it cannot be doubted that the government would have been entitled to collect two stamp taxes: one on the sale of the stock to the plaintiff; the other on the transfer of legal title from the plaintiff to its agent. But the transaction as actually carried out did not take this form, although it accomplished the same result, and in the matter of stamp duties the form
95 is all important. *United States* v. *Isham,* 17 Wall. 496. The tax cannot therefore be sustained on the theory that in legal effect the transaction was the same as though the plaintiff had taken legal title to the shares and transferred them to its nominee. But it can be sustained, in my opinion, on the theory that the nomination of Benton & Company as the person to whom the certificate was to be issued, falls within the exact letter of the statute taxing "transfers of legal title to * * * rights * * *
96 to receive such shares or certificates". Prior to such nomination the plaintiff had the right to receive the shares and by its nomination its right was transferred to its nominee. True, the right was conditional upon payment for the shares by the plaintiff, but the statute does not indicate that the right to receive shares must be unconditional at the time when it is transferred in order to constitute a taxable transfer. The phrase of the statute upon which I rely has been applied in several cases where one corporation has sold its assets to another to be paid for by stock of the latter which the vendor directed

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to be issued to its stockholders. *Marconi Wireless Telegraph Co.* v. *Duffy*, 273 Fed. 197; *George A. Hormel & Co.* v. *United States*, 10 Fed. Supp. 623; *United States* v. *Brown Fence & Wire Co.*, 9 Fed. Supp. 1008; *Raybestos Manhattan Inc.* v. *United States*, 10 Fed. Supp. 130. Compare cases reaching a different result on slightly different facts. *Minnesota M. & M. Co.* v. *Willcuts*, 2 Fed. Supp. 789; *Westmoreland Coal Co.* v. *McLaughlin*, 8 Fed. Supp. 963. *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl*, 63 Fed. (2nd) 202 (C. C. A. 5).

98

The *Marconi* case, in my judgment, is right and should govern the case at bar. It is true that in the *Marconi* case the nominees received the stock for their own benefit, while here Benton & Company holds it for the plaintiff. But the fact that the transferee gets no beneficial interest is made immaterial by the express terms of the statute.

The plaintiff makes no attempt to explain why the nomination of Benton & Company should not be deemed a transfer of plaintiff's right to receive shares of stock. It rests its argument chiefly upon *Union Trust Co.* v. *Heiner*—26 Fed. (2nd) 391, and cases following it. *Dean* v. *Caldwell & Co.*—9 Fed. Supp. 177; *Field, Glore & Company* v. *United States* (Northern District, Illinois, April 8, 1935).

99

It seems to me that the decision in *Union Trust Co.* v. *Heiner* disregards the express words of the statute. There the argument that the nominee transferred a "right to receive" the shares seems to have been disposed of by the court with the statement that the nominee was a mere employee and had no beneficial interest in the stock.

100 *Order Appealed From*

But since the statute itself says that it is immaterial whether the transferee receives a beneficial interest, I am not inclined to follow *Union Trust Co.* v. *Heiner.*

In my opinion the tax was validly assessed, and accordingly the motion to dismiss the complaint is granted.

September 10th, 1935.

HENRY W. GODDARD,
U. S. D. J.

101

Order Appealed From

At a Stated Term of the United States District Court held in and for the Southern District of New York in the U. S. Courts and Post Office Building, Borough of Manhattan, City of New York, on the 22nd day of September, 1935.

102 Present—Hon. HENRY W. GODDARD,
United States District Judge.

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.
} L59—320

The defendant having moved this Court for an

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order dismissing the complaint herein, and the said motion having duly come on to be heard on the 9th day of July, 1935,

Now, on the reading and filing of the notice of motion herein, dated June 6, 1935, and after hearing F. W. H. Adams, Esq., United States Attorney for the Southern District of New York, attorney for the defendant, James J. Hoey, Collector of United States Internal Revenue for the Second District of the State of New York, Henderson Mathews, Assistant United States Attorney, of counsel, in support of the motion, and Royal E. T. Riggs, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had thereon, it is

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ORDERED that the motion be and the same is hereby granted and the complaint herein is dismissed, and it is

FURTHER ORDERED that the defendant have judgment for costs against the plaintiff, Founders General Corporation, and that execution issue therefor.

105

HENRY W. GODDARD,
U. S. D. J.

106 **Judgment Appealed From**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
107 *Defendant.*
} L59—320

A motion of the defendant to dismiss the complaint in the above entitled action having come on regularly to be heard on the 9th day of July, 1935, before the Honorable Henry W. Goddard, and the defendant having appeared by F. W. H. Adams, Esq., United States Attorney for the Southern District of New York, by Henderson Mathews, Assistant United States Attor-
108 ney, of counsel, in support of the motion, and the plaintiff having appeared by Royal E. T. Riggs, Esq., in opposition thereto, and the Court after deliberation having granted the motion of the defendant to dismiss the complaint herein, and having directed that judgment herein be entered in favor of the defendant, James J. Hoey, Collector of United States Internal Revenue for the Second District of the State of New York, against the plaintiff, Founders General Corporation, for costs, and the defendant's costs having been taxed in the sum of $20.00 and upon the filing of the order herein,

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Now, on motion of F. W. H. Adams, United States Attorney for the Southern District of New York, attorney for the defendant, it is

ORDERED and ADJUDGED that the complaint herein be and it is hereby dismissed and that the defendant, James J. Hoey, Collector of United States Internal Revenue for the Second District of the State of New York, recover of the plaintiff, Founders General Corporation, the sum of $20.00, costs as taxed, and that execution issue therefor.

110

Judgment entered this 28th day of September, 1935.

CHARLES WEISER,
Clerk.

Petition for Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

111

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

The plaintiff, Founders General Corporation, considering itself aggrieved by the decision, order and judgment of the District Court of the Southern District of New York, which order and judgment were entered herein in the office of the

112 *Petition for Appeal*

Clerk of this Court on the 25th and 28th days of September, 1935 respectively, in favor of the defendant above named and against the plaintiff above named, ordering and adjudging that the complaint of the plaintiff herein be dismissed, and that the defendant recover of the said plaintiff the sum of $20. costs as taxed, does hereby petition for appeal from said decision, order and judgment for the reasons specified in the Assignment of Errors filed simultaneously herewith, and prays that the appeal may be allowed to the
113 United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, October 23, 1935.

FOUNDERS GENERAL CORPORATION,
By SEIBERT & RIGGS

Signed SEIBERT & RIGGS,
Its Attorneys,
No. 30 Broad Street,
Borough of Manhattan,
City of New York.
114

MURRAY TAYLOR
of Counsel.

Allowance of Appeal

115

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

116

Upon the foregoing petition, it is

ORDERED, that the appeal herein prayed for by the plaintiff above named, be and the same hereby is allowed.

Dated, New York, October 23, 1935.

117

HENRY W. GODDARD
C. W. U. S. D. J.

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Assignment of Errors

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,
against
JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

119

Now comes the plaintiff in the above entitled cause and makes and files the following assignment of errors, upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the order and judgment entered by this Honorable Court on the 25th and 28th days of September, 1935, respectively, in favor of the

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above named defendant and against the above named plaintiff ordering and adjudging that the complaint of the plaintiff herein be dismissed and that the defendant recover of the said plaintiff the sum of $20. costs, as taxed; and shows that in the proceedings, record, order and judgment in the above entitled cause there was error in the following respects:

1. There was error by the United States District Court for the Southern District of New York in granting the motion made by the de-

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fendant to dismiss the complaint, and in ordering and adjudging that the complaint be dismissed, and that the defendant recover $20. costs as taxed.

Dated, New York, October 23, 1935.

FOUNDERS GENERAL CORPORATION,
By SEIBERT & RIGGS

Signed SEIBERT & RIGGS,
Its Attorneys,
No. 30 Broad Street,
Borough of Manhattan,
City of New York.

122

MURRAY TAYLOR
of Counsel.

123

124

Citation

By the Honorable Henry W. Goddard
One of the United States District Judges for the Southern District of New York, in the Second Circuit

To

James J. Hoey,
Collector of United States Internal Revenue for the Second District of the State of New York,

125 Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named on the 21st day of November, 1935, pursuant to an appeal to said court filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Founders General Corporation is the appellant and you are the appellee to show cause, if any there
126 be, why the order and judgment in said petition for appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 23rd day of October, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and sixtieth.

Henry W. Goddard
United States Judge for the Southern District of New York in the Second Circuit.

C.W.

Stipulation as to Record 127

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION, *Plaintiff-Appellant,* *against* JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York, *Defendant-Appellee.*	L59—320

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IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, N. Y., December 12, 1935.

SEIBERT & RIGGS,
Attorneys for Plaintiff-Appellant. 129

LAMAR HARDY,
United States Attorney for the Southern District of New York,
Attorney for Defendant-Appellee.

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Clerk's Certificate

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FOUNDERS GENERAL CORPORATION,
Plaintiff,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Defendant.

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I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by stipulation between the attorneys for the respective parties.

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IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed at The City of New York, in the Southern District of New York, this day of December, in the year of our Lord one thousand nine hundred and thirty-five, and of the independence of the United States the one hundred and sixtieth.

CHARLES WEISER,
Clerk.

(Seal)

[fol. 45] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued March 6, 1936. Decided July 6, 1936

No. 282

FOUNDERS GENERAL CORPORATION, Plaintiff-Appellant,

v.

JAMES J. HOEY, Collector, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Appeal from United States District Court for the Southern District of New York.

From a judgment dismissing the complaint in this action on the ground that it stated no cause of action, the plaintiff appeals. Affirmed.

Seibert & Riggs, of New York City (Royal E. T. Riggs and Murray Taylor, both of New York City, of counsel), for plaintiff-appellant.

Lamar Hardy, U. S. Atty., of New York City (Henderson Mathews, Asst. U. S. Atty., and Richard Delafield, Sp. Asst. to the U. S. Atty., both of New York City, of counsel), for defendant-appellee.

AUGUSTUS N. HAND, Circuit Judge:

This action was brought to recover from the defendant, as collector of internal revenue, the sum of $4,733.33, and interest, which was a tax alleged to have been collected by him from the plaintiff without lawful authority. On September 10, 1929, the plaintiff, Founders General Corporation, entered into a written agreement with United States Electric Power Corporation to subscribe for 100,000 shares of the common stock of the latter at a price of $13.50 per share, each share to be accompanied by a warrant entitling the holder to subscribe before January 2, 1940, for an addi-

tional share at the rate of $25 per share. The 100,000 shares with warrants attached were to be delivered on September 17, 1929. After its subscription, but prior to September 17, 1929, the plaintiff directed the seller to issue the securities in the name of Benton & Co. as its nominee. In accordance with these instructions, the United States Electric Power Corporation caused a certificate for 100,000 shares with warrants attached to be issued in the name of Benton & Co. The power corporation paid the documentary stamp tax upon this issue, and, upon receipt of the amount subscribed for the stock, delivered the securities issued in the name of Benton & Co. to the plaintiff. It is to be observed that unde rthis arrangement there was never any delivery of the certificate to Benton & Co.; but it passed directly from the power corporation to the plaintiff. Benton & Co. is a partnership whose sole business is to have securities belonging to the plaintiff taken and held in its name. Neither that firm nor any of its members have any interest in securities so held. Under a contract with the plaintiff, it receives an annual fee of $1,500 for acting as the latter's nominee.

Some of the shares issued by the power company were thereafter transferred to third parties from the name of Benton & Co., and upon these a stock transfer tax was paid. But, in spite of the payment of the documentary tax on the [fol. 46] issue and the transfer tax on those shares transferred from the name of Benton & Co., the Commissioner assessed a stock transfer tax amounting with penalty and interest, to $4,733.33, upon the alleged transfer of the 100,000 shares of stock from the plaintiff to Benton & Co. This sum the plaintiff paid to the collector and now seeks to recover in the present action on the ground that the transaction involved no transfer, and the tax was therefore an unlawful exaction.

In a contract between the Founders General Corporation and the partnership of Benton & Co., it was provided that the latter was appointed agent "for the limited purpose of holding in the firm name stocks, bonds, notes, and other securities and property as agent (other than commission agent or broker) for the account of the Corporation and of otherwise acting with respect thereto in accordance, but only in accordance with the written instructions of the Corporation. * * *" It was also provided that Ben-

ton & Co. should have no "beneficial interest" in securities so held, that it waived all right, title, and interest in any securities held or received by it, and that the corporation was appointed the agent and attorney of Benton & Co., with full power to sell, assign, indorse, transfer, and deliver such securities.

The court dismissed the complaint, which set forth the foregoing facts on the ground that it stated no cause of action, and from the judgment of dismissal the present appeal was taken. The question is whether the mere nomination of Benton & Co. as a dummy in whose name the stock was registered subjected the plaintiff to a stock transfer tax under title 8, section 800, of the Revenue Act of 1926 (44 Stat. 99, 101).

This section, so far as applicable, reads as follows:

"Schedule A.—Stamp Taxes. * * *

"3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper, or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: Provided, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: Provided further, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts."

It is to be observed that the act imposes a tax not only on "transfers of legal title to shares or certificates of stock," but also on transfers of legal title "to rights to subscribe for or to receive such shares or certificates." Judge Goddard, who presided in the District Court, 12 F. Supp. 290, 292, upheld the tax in an opinion that shows how inevitable was the result reached. He said that: "The nomination of Benton & Co. as the person to whom the certificate was to be issued falls within the exact letter of the statute taxing 'transfers of legal title to * * * rights * * * to receive such shares or certificates.' Prior to such nomination the plaintiff had the right to receive the shares, and by its nomination its right was transferred to its nominee. True, the right was conditional upon payment for the shares by the plaintiff, but the statute does not indicate that the right to receive shares must be unconditional at the time when it is transferred in order to constitute a taxable transfer."

In Union Trust Co. v. Heiner, 26 F. (2d) 391, the District Court for the Western District of Pennsylvania held that transfers to mere nominees were not subject to tax. In that case stock was purchased by the plaintiff, and, by his order, was taken in the name of his employee, [fol. 47] who had no beneficial interest therein and took the certificate merely for the convenience of the plaintiff in connection with future sales and transfers. The statute involved was section 1100, Schedule A (3) of title 11 of the Revenue Act of 1921 (42 Stat. 303, 304), which, like the act of 1926, imposed a stamp tax upon the transfer of "rights to subscribe for or to receive" certificates of capital stock. The decision went off on the theory that there "was no transfer of any rights in this stock to Kommer," the employee, because "he was the mere employee and agent of the plaintiff, appointed to receive and hold this capital stock for the sole and exclusive benefit of the plaintiff. He had no beneficial interest whatever in the stock." Under the act of 1921, as under the later acts, the tax was imposed upon transfers "whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not." It is plain that the court in Union Trust Co. v. Heiner ignored the express provision that the absence of any beneficial interest on the part of the holder should not exempt the transfer from taxation. The decision, there-

fore, proceeded on an indefensible theory. That decision has since been followed by various district courts, but we cannot avoid the conclusion that it is contrary to the plain meaning of the statute. Indeed, the provisos in the act of 1926 to the effect that no tax shall be imposed upon an agreement for deposit of certificates for collateral security seem to set the entire limit of all exceptions to the broadly inclusive terms of the act. They can hardly have been inserted merely ex abundanti cautela. The sweeping character of the statute is further indicated by the decisions of the Supreme Court in Raybestos-Manhattan Co. v. United States, 296 U. S. 60, 56 S. Ct. 63, 80 L. Ed. —, 102 A. L. R. 111, and Provost v. United States, 269 U. S. 443, 46 S. Ct. 152, 70 L. Ed. 352. A broad construction of a statute of the state of New York, which was substantially like section 800 of the Revenue Act of 1926, was adopted by the New York courts in Bonbright & Co. v. New York, 165 App. Div. 640, 151 N. Y. S. 35, and Travis v. Ann Arbor, 180 App. Div. 799, 168 N. Y. S. 53, affirmed 227 N. Y. 640, 126 N. E. 923. Under that statute (Tax Law [Consol. Laws N. Y.] § 270, as amended by laws 1911, c. 352) a stamp tax was imposed upon transfers "whether investing the holder with the beneficial interest in or legal title to * * * stock or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock." It was decided in the Travis Case that a transfer from one nominee to a second, and an indorsement of the certificate by the latter, who made delivery of it on behalf of the true owner, involved two taxable transfers, though in neither event was there any change in the beneficial interest. In Bonbright & Co. v. New York, Howard, J., said:

"'The expression 'legal title' is frequently used in stock transactions and in other transactions to describe a naked appearance of title, or a limited title appearing complete on its face. It is so used in the agreement in this case. * * * The expression 'legal title,' as used in the amended statute, must be held to signify the appearance of title, as distinguished from a full and complete title. The statute recognizes that this appearance of title to the stock may be transferred, while the real title, the real ownership, remains in the transferror." 165 App. Div. 640, 644, 645, 151 N. Y. S. 35, 38.

Thus the New York courts sustained a tax upon the theory that there was transfer to the nominee not merely of possession but of the very title to the shares as the term "title" was used in the statute. We only have to go so far as to hold that there was a disposition of the right to receive.

We do not think that the arrangement whereby the certificate was delivered by the seller directly to the plaintiff avoided the imposition of a tax. There was a transfer to Benton & Co. of the right to receive the stock, and even the certificate was unavailable for use until indorsed by Benton & Co. or by the plaintiff as the agent of the latter under the power of attorney contained in the contract between the parties.

The plaintiff further contends that the decision in Union Trust Company v. Heiner, supra, to the effect that such a transfer as the one now in question is not taxable, should bind the government because Congress by subsequently reenacting the Stamp Tax Law adopted the construction of [fol. 48] the statute promulgated by that decision. But the provisions of the act involve no ambiguity, nor was there any continued acquiescence on the part of the government in the ruling in the Heiner Case, nor has there been a decision by any appellate court so construing the act. Moreover, under an amendment to Schedule A (3) of section 800 of Revenue Act of 1926 by section 723 of the Revenue Act of 1932 (26 U. S. C. A. § 900 note), a new proviso was added to the effect that the tax should not be imposed upon deliveries or transfers from a fiduciary to a nominee of such fiduciary or from one nominee of such fiduciary to another. This amendment can hardly be regarded as futile. It is strongly persuasive of a congressional intent to tax transfers to nominees in all cases other than those specifically excepted under the provisos of the section.

In view of the foregoing, we think it clear that the tax levied in the present case was properly imposed.

Judgment affirmed.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 13th day of July, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

FOUNDERS GENERAL CORPORATION, Plaintiff-Appellant,

vs.

JAMES J. HOEY, Collector, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 50] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Founders General Corporation vs. James J. Hoey, Collector, etc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 13, 1936. William Parkin, Clerk.

[fol. 51] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 50, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Founders

General Corporation, Plaintiff-Appellant, against James J. Hoey, Collector, etc., Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of August, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 9, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 330 and 331.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
SEP 25 1936
CHARLES ELMORE CROP
CLER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 398

FOUNDERS GENERAL CORPORATION,
Petitioner, and *Plaintiff-Appellant* below,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Respondent, and *Defendant-Appellee* below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

ROYAL E. T. RIGGS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No.

FOUNDERS GENERAL CORPORATION,
Petitioner, and
Plaintiff-Appellant below,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Respondent, and
Defendant-Appellee below.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, FOUNDERS GENERAL CORPORATION, a Maryland Corporation, respectfully shows:

I

Summary statement of the matter involved.

This was an action at law to recover $4,733.33 with interest alleged to have been erroneously assessed and

collected as a stamp tax under Schedule A, Subdivision (3) of Section 800 of the Revenue Act of 1926, upon the alleged transfer of the petitioner's right to receive certain shares of capital stock subscribed for by the petitioner, the certificate representing which was issued in the name of petitioner's nominee but delivered to the petitioner.

That section, hereinafter quoted in full, purported to impose a stamp tax upon the transfers of *"legal title to* shares or certificates of stock * * * in any corporation, *or to rights to subscribe for or to receive such shares or certificates,* whether made upon or shown by the books of the corporation, or by any assignment in blank * * * or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not." (Italics ours.)

No complaint is made as to the amount of the tax, if the transaction herein referred to is taxable. The government claims that the tax is due upon the "invisible transfer" of the right to receive the shares from the subscriber to its nominee. The petitioner insists that there was no transfer of anything to its nominee which was taxable under the statute.

The petitioner paid the tax under protest, filed a claim for refund which was rejected and brought suit to recover the tax so paid.

The United States Attorney for the Southern District of New York, attorney for the defendant, moved to dismiss the complaint pursuant to Section 280 of the New York State Civil Practice Act and Rule 106 of the Rules of Civil Practice of the Supreme Court of the State of New York on the grounds that the petitioner's complaint did not state

facts sufficient to constitute a cause of action (Record, p. 25). This motion came on to be heard before United States District Judge Henry W. Goddard, and after argument and submission of briefs, Judge Goddard handed down an opinion granting the motion to dismiss the complaint (Opinion of Goddard, U.S.D.J., Record, p. 27). Thereupon an order was entered dismissing the complaint and judgment was likewise entered dismissing the complaint (Order, Record, p. 34; Judgment, Record, p. 36). An appeal was taken by petitioner from the order and judgment dismissing the complaint, and after argument the United States Circuit Court of Appeals for the Second Circuit delivered an opinion affirming the judgment of the court below (Record, p. 45).

Facts

The motion to dismiss the complaint was made under the New York Rules of Civil Practice above referred to, and for the purposes of the motion the facts set forth in petitioner's complaint must be accepted as the facts of the case. These may be briefly summarized as follows:

1. On September 10, 1929, petitioner entered into a written agreement with United States Electric Power Corporation to subscribe for 100,000 shares of Common Stock of United States Electric Power Corporation at a price of $13.50 per share, each share having certain attached warrants, such stock and warrants being hereafter referred to as "stock". By the terms of the subscription, payment was to be made by the petitioner on September 17, 1929 (Record, fols. 9, 10).

2. Prior to the time set for delivery, petitioner directed United States Electric Power Corporation to

issue its certificates representing said 100,000 shares of stock in the name of Benton & Co., petitioner's nominee (fol. 11).

The name of Benton & Co., the nominee, was used simply for the convenience of the petitioner in connection with future sales and transfers of stock to the public.

3. Benton & Co. was a partnership organized pursuant to a written agreement dated March 31, 1928 (Exhibit A attached to the complaint; fols. 25-27). The partners were all employees of petitioner, and the partnership continued only so long as they were employees (fol. 34). The purpose of the partnership was to enter into a contract with the petitioner, and the business of the partnership was limited to the holding in the firm name of stocks, bonds, notes and other security and property *"as agent for the account of"* the petitioner (fol. 28). The partnership could perform no other business. It had no capital. Neither the partnership nor any member thereof had or could claim "any beneficial interest whatsoever in any stocks * * * at any time held by the partnership"; and further, "All *right, title,* equity, interest, lien, claim and demand whatsoever in and to any stocks, bonds, notes and other securities and property at any time held or received or receivable by the partnership * * * are hereby irrevocably waived and disclaimed" (fols. 44-46).

4. The partnership entered into a written agreement with the petifioner (Exhibit B attached to the complaint; fols. 39-52) wherein the petitioner appointed the partnership its agent "for the limited purpose of holding in the firm name stocks, bonds, notes and other securities and property as agent (other than commission agent or broker) for the account of the corporation" (fol. 41).

NOTE: References are to pages in Record.

The partnership was to receive $1,500 a year for its services as agent (fol. 42). By this agreement neither the partnership nor any member thereof could claim any beneficial interest whatsoever in any stocks, bonds or other securities at any time held by the partnership and "All *right, title,* equity, interest, lien, claim and demand whatsoever in and to any stocks, bonds, notes and other securities and property at any time held or received or receivable by the partnership * * * are hereby irrevocably waived and disclaimed by said firm and each and every member thereof" (fols. 45, 46). The partnership appointed the petitioner its attorney-in-fact for the purpose of endorsing any securities registered in the partnership name (fol. 48).

Benton & Co. also agreed to deliver on demand of the petitioner all assignments, powers of attorney, with respect to any stock in its name as might be requested by plaintiff (fol. 47).

5. Prior to September 17, 1929, the date set for payment, United States Electric Power Corporation directed its Transfer Agent and Registrar to make out one certificate in the name of said Benton & Co. for 100,000 shares of stock, and such certificate was thereafter made out and on September 17, 1929, the petitioner paid for said stock at the rate of $13.50 per share and received in return for such payment said certificate for 100,000 shares of stock with warrants attached, registered in the name of Benton & Co. (fols. 15, 16). The certificate was delivered to petitioner, not to Benton & Co. and Benton & Co. never had possession of it.

6. The documentary stamp tax upon the original issue was duly paid and the stamp tax upon the transfer of such stock out of the name of Benton & Co. to third parties was duly paid (fol. 16).

NOTE: References are to pages in Record.

7. In October, 1934, the United States demanded the sum of $4,733.33 as a tax with penalty and interest upon the alleged transfer by the petitioner to Benton & Co. of the right to receive the stock from United States Electric Power Corporation upon the subscription made by the petitioner. Payment of the amount demanded was made under protest and a claim for refund was duly filed and subsequently rejected (Record, fols. 18-21).

The petitioner's claim for a refund is annexed to the complaint marked Exhibit C (Record, p. 20), and in addition to the facts above set forth, alleges that the assessment of the tax was contrary to the decision of the United States District Court for the Western District of Pennsylvania in *Union Trust Company* v. *Heiner*, 26 Fed. (2nd) 391 (1928), upon which petitioner relied in failing to pay the tax upon the alleged transfer to its nominee at the time the stock was issued.

Question Presented

Upon the foregoing facts the question is presented as to whether a corporation which is a subscriber for capital stock, the original issue tax having been duly paid, is liable to pay a transfer tax as well, imposed by Schedule A(3) of Section 800 of the Revenue Act of 1926, where the corporation directs and causes the certificate representing the stock to be issued in the name of its nominee for its convenience in connection with future sales and transfers of stock to the public, when such nominee has neither any right, title, equity, interest, lien, claim or demand whatsoever in such stock, nor possession of the certificates representing the same.

II

Reasons for issuance of the writ.

1. The decision in the instant case by the Circuit Court of Appeals for the Second Circuit, rendered July 6, 1936, is in direct conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit rendered a week previously upon June 30, 1936 in *United States* v. *A. B. Leach & Co.** in an opinion not yet officially reported. The question herein presented has never been passed upon by this court.

2. The decision of the Circuit Court of Appeals for the Second Circuit in the instant case determined a question which is of every-day and constant interest to the business world. Few, if any, corporations hold stock owned by them in their corporate name because when sold such stock is not good delivery, except when accompanied by necessary resolutions of the directors. Therefore, it is common practice for corporations to hold stock in the name of nominees or dummies. That the issuance of stock certificates in the name of a dummy did not require payment of a double stamp tax was squarely determined in *Union Trust Company* v. *Heiner*, 26 Fed. (2nd) 391, in the District Court of the United States for the Western District in Pennsylvania on February 8, 1928. The government did not appeal. In reliance upon the interpretation of the law in that case, thousands of transactions were consummated. The doctrine of that case has been followed in four District Courts of the United States and by the Circuit Court of

*Reported Commerce Clearing House—1936 Federal Tax Service—Vol. 4, p. 10049—¶9388; and Prentice-Hall—1936 Federal Tax Service—Vol. 1 at ¶1362.

Appeals for the Seventh Circuit. The instant case is the only case in which the government has been successful in establishing as taxable an alleged transfer which was non-taxable under the only existing judicial decision at the time it was carried out.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket Calendar No. 282, *Founders General Corporation, Appellant* v. *James J. Hoey, Collector of United States Internal Revenue for the Second District of the State of New York, appellee,* and that the said decision and judgment of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FOUNDERS GENERAL CORPORATION,
By: ROYAL E. T. RIGGS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

FOUNDERS GENERAL CORPORATION,
Petitioner, and
Plaintiff-Appellant below,

against

JAMES J. HOEY, Collector of United States Internal Revenue for the Second District of the State of New York,
Respondent, and
Defendant-Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of the District Court for the Southern District of New York dismissing the complaint upon the ground that it fails to state a cause of action, is dated September 10, 1935 and is found at page 27 of the record. It is reported at 12 Fed. Supp. 290. The opinion of the Circuit Court of Appeals for the Second Circuit is dated July 6, 1936 and is found at page 45 of the record. It has not yet been officially reported.

Jurisdiction

The statute granting the power to review herein is U. S. Code, Title 28, §347 (Judicial Code §240). The date of the decision and judgment to be reviewed is July 6, 1936.

Statement of the Case

The statement of the case has been given under heading I in the petition submitted herewith and hence the statement is not repeated here.

Specification of Error

The Circuit Court of Appeals for the Second Circuit erred in affirming the order and judgment of the District Court for the Southern District of New York dismissing the complaint upon the ground that it failed to state a cause of action, in that the transaction set forth in the complaint was not a taxable transfer under Schedule A, subdividion 3 of Section 800 of the Revenue Act of 1926, and the complaint sets forth a cause of action to recover taxes erroneously assessed and paid under protest.

The Statute

The transfer tax imposed by Schedule A, subdivision (3), Section 800 of the Revenue Act of 1926, C. 27, 44 Stat. 99, 101; U. S. C. Title 26, Secs. 900, 901, *et seq.*, reads as follows:

> "3. Capital stock, sales or transfers: On all sales or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares

or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share:

"*Provided,* That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned:

"*Provided further,* That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts:

"*Provided further,* That in case of sale where the evidence of transfer is shown only by the books of the corporation the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall

be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers.

"Any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale, or who in pursuance of any such sale delivers any certificate or evidence of the sale of any stock, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both."

ARGUMENT

POINT I

There was no transfer by the plaintiff to Benton & Co. of the legal title to rights to receive the shares or certificates from United States Electric Power Corporation.

The plaintiff directed that the certificates for 100,000 shares should be issued in the name of its nominee prior to payment therefor as a convenience to itself with reference to future sales to the public.

Until payment was made for the stock there was no right to receive the stock either by the plaintiff or by any-

body else. At the time that payment was made for the stock, by plaintiff, the certificate was delivered directly to the plaintiff in the name of Benton & Co. At all times plaintiff was the only person entitled to receive the stock upon payment therefor. The nominee never received the possession of the certificate. Nor was the endorsement of the nominee necessary to assign the certificate, for the plaintiff had full power as attorney-in-fact to endorse the certificate by the agreement (Record, fol. 48). The terms of the partnership agreement and of the agreement between the plaintiff and the partnership not only expressly disclaimed any beneficial interest in the stock whatsoever on the part of Benton & Co. but expressly disclaimed on the part of the nominee "all right, title, interest, lien, claim and demand" to the stock whatsoever. Benton & Co. was the alter ego and agent only of the plaintiff, which at all times had all right, title and interest, legal, equitable and beneficial, to the stock in question and the right to receive and hold the certificates.

The Court will take judicial notice of the fact that stock in the name of a corporation is not good delivery under ordinary business practice unless accompanied by certified copies of resolutions of the Board of Directors or Executive Committee of the corporation authorizing the delivery and sale of the specified shares represented by the certificate sold. It has been the universal practice to have all corporations engaged in the purchase and sale of stock, or indeed those corporations holding stock, to have the same registered in the name of their agents or nominees, either as an individual or partnership nominee.

In February, 1928, the United States first asserted a claim for taxes upon what it termed "the invisible trans-

fer" of the right to receive shares purchased by a corporation to its nominee. The facts were squarely presented and decided in *Union Trust Co. of Pittsburgh* v. *Heiner*, decided in the District Court for the Western District of Pennsylvania, February 8, 1928 (26 Fed. [2nd] 391).

The facts in the *Heiner* case were as follows (p. 391):

> "On November 27, 1922, the plaintiff entered into a written agreement with one B. F. Jones, Jr., whereby it agreed to purchase, at the option of said B. F. Jones, Jr., certain stock of Jones & Laughlin Steel Corporation, to be delivered to the plaintiff, or its nominee or nominees. Jones exercised the option, and the stock involved was issued at the request of the plaintiff to one James M. Kommer, an employee of the plaintiff. As a matter of fact, Kommer had no interest in the stock in question, and merely took title to the stock for the convenience of the plaintiff, in connection with future sales and transfers of the stock to the public. Tax stamps required to be placed on the original issue of stock were placed on that issued to Kommer. The government compelled the plaintiff to pay stamp tax of $3,428.04 upon the instrument, nominating Kommer to receive the stock in question. Due demand was made upon the Commissioner of Internal Revenue for the refundment of this amount, and the same has not been refunded; whereupon the plaintiff brought this suit to recover what it contends is an illegal exaction of stamp taxes from it."

The Government contended in the *Heiner* case that the nomination of Kommer by the plaintiff to take title for it to the stock in question was the delivery to him of a "right to receive" the shares, and therefore taxable. These

facts were set forth in the complaint to which the defendant demurred. The court (Judge Schoonmaker) over ruled the demurrer stating (p. 391):

> "* * * In our opinion, there was but one transaction involved in this issue of stock. *There was no transfer of any rights in this stock to Kommer. He was the mere employee and agent of the plaintiff, appointed to receive and hold this capital stock for the sole and exclusive benefit of the plaintiff.* He had no beneficial interest whatever in the stock. We are of the opinion that the facts disclosed by the statement of claim present a case of an illegal exaction of a stamp tax from the plaintiff in this case." (Italics ours.)

There was no appeal by the Collector represented by the United States Attorney from the decision in the *Heiner* case. *From 1928 until 1934 the Heiner case remained as the sole authoritative judicial determination of the Revenue Act of 1926 upon the point in question.* Not until 1934, six years after the *Heiner* ruling, did the government assert, so far as the petitioner is concerned, that stamp taxes were due upon the issuance of stock in the name of an individual or partnership nominee or dummy. In the meantime thousands of similar transactions had occurred.

Since 1934 the government has tried repeatedly in various jurisdictions to obtain a ruling contrary to that of the *Heiner* case, so that it might now tax as taxable all such transactions which have been carried out as nontaxable under the only judicial interpretation of the act in the law books. It has been, until the decision in the instant case, uniformly unsuccessful.

The *Heiner* decision has been followed in *Dean* v. *Caldwell Co.*, 9 Fed. Supp. 177 (District Court M. D.

Tennessee, decided March 19, 1934, by Judge Gore), and again in the recent cases of *Field, Glore & Co.* v. *United States of America,* decided April 8, 1935, by Judge Barnes, in the District Court of the United States for the Northern District of Illinois, Eastern Division (Reported in Commerce Clearing House—Federal Tax Service, Vol. III-A, 1935, pp. 9803-9806), and in *A. B. Leach & Co.* v. *United States,* decided in the Northern District of Illinois, Eastern Division on July 16, 1935 by Judge Holly. (Reported in Commerce Clearing House—Federal Tax Service, Vol. 3-A, 1935, pp. 10583-10584.) The same question was presented in *National Bond & Share Co.* v. *Hoey,* 14 Fed. Supp. 787 decided adversely to the Collector of Internal Revenue by Judge Patterson in the Southern District of New York on April 15, 1936. Five district court judges have, therefore, decided this precise point against the United States.

The court below referred to *Union Trust Company* v. *Heiner* and stated:

> "It is plain that the court in *Union Trust Company* v. *Heiner* ignored the express provision that the absence of any beneficial interest on the part of the holder should not exempt the transfer from taxation. The decision, therefore, proceeded on an indefensible theory. That decision has since been followed by various district courts, but we cannot avoid the conclusion it is contrary to the plain meaning of the statute".

We think that this is an incorrect deduction from the opinion in the *Heiner* case in that the decision, as in the *Leach* decision in the Seventh Circuit, hereafter referred to, the court had held that there was no transfer of *any rights* in the stock to the nominee.

Although the Court of Appeals for the Second Circuit affirmed Judge Goddard's opinion in this case, the affirmance rested upon a different interpretation of the statute from that adopted by Judge Goddard. In Judge Goddard's opinion he stated that the tax could not be sustained on the theory that in legal effect the transaction was the same as though the plaintiff had taken legal title to the shares and transferred them to its nominee, but then said:

> "But it can be sustained, in my opinion, on the theory that the nomination of Benton & Company as the person to whom the certificate was to be issued, falls within the exact letter of the statute taxing 'transfers of legal title to * * * rights * * * to receive such shares or certificates'" (Record, fol. 95).

It is thus apparent that Judge Goddard held that to find a transaction taxable, it must fall within the transfer of the *legal title* to rights to receive such shares or certificates. This test of the transfer of the legal title to the rights to receive the shares or certificates was discarded by the Circuit Court of Appeals. In that opinion the court referred to the expression "legal title" as used in a New York case, and quoted an excerpt from the opinion in which the New York Court had stated that that expression must be held to signify the appearance of title as distinguished from a full and complete title, and said:

> "Thus the New York courts sustained a tax upon the theory that there was a transfer to the nominee not merely of possession, but of the very title to the shares as the term 'title' was used in the statute. *We only have to go so far as to hold that there was a disposition of the right to receive.*" (Italics ours.) (Record, ~~fol~~ R 50.)

The reference to the New York decision is to the *Bonbright* case, 165 App. Div. 640, in which there was a transfer on the corporate books of certificates from a stockholder to a trustee and delivery of the stock certificate. The taxpayer claimed that there was no full and complete legal title vested in the trustee, and the court held that the transfer of legal title and possession was sufficient to impose a tax. The facts are entirely different from those here presented.

Be that as it may, however, the court below did not go so far as to hold that the legal title of the rights to receive the shares had been transferred by the plaintiff to its nominee, Benton & Company, but held that it was sufficient to make the transaction taxable, if there was "a disposition of the right to receive". This is a distortion of the statute which is not justified, for plainly the phrase "or to rights to subscribe for or to receive such shares or certificates" refers back to and is appended to the previous phrase which makes taxable "transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation", otherwise it is ungrammatical and meaningless. Judge Goddard's interpretation of the test of the statute as "transfers of legal title to * * * rights * * * to receive such shares or certificates" was a correct interpretation of the statute, even if incorrectly applied in the instant case. The act taxes transfers of legal title, not the transfer of the appearance of title, or a "disposition of the right to receive." The decision of the Court of Appeals for the Second Circuit, however, declares that this transaction was taxable not because there was a transfer of the legal title of the rights to subscribe, but because there was a transfer of "a disposition of the

right to receive". The opinion of the court below reads something into the statute which is not there.

The opinion in *United States* v. *Leach* decided by the United States Circuit Court of Appeals for the Seventh Circuit on June 30, 1936, just a week prior to the decision in the instant case, is to the exact contrary. In that case a firm of investment brokers subscribed for the capital stock of a newly formed corporation and caused it to be issued in the name of their nominee for convenience in contemplated sales to the public. The government assessed an additional tax on the alleged transfer of the right to receive the shares from the investment brokers to their nominee, which tax was paid in protest and was sought to be recovered in an action. The Court said:

> "We agree with appellee in its contention. We see no material distinction between the situation where a taxpayer takes title to stock in its own name, and where it uses the name of an agent. Certainly this does not present the shortcut in transfer of interest held taxable in the case of *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60. Here there is no such shortcut, for there is no transfer, either of legal title or of beneficial interest. We do not consider that the transaction whereby a principal uses the name of an agent in acquiring title to a property which it was entitled to acquire in its own name, results in a transfer of the title to that property to that agent. *By such a transaction the taxpayer relinquishes nothing, and its agent receives nothing.* The only transfer which has taken place here is from the newly organized corporation to the taxpayer in the name of the agent or nominee of the latter. The conclusion here reached is in accord with the decision of *Union Trust Co.* v. *Heiner*, 26 F. (2d) 391

(D. C. W. D. Pa.) with which we agree. Cf. *United States* v. *Uhlmann Grain Co.*, decided by this court June 18, 1936."

Moreover, the statement of the court below that there was "a disposition of the right to receive the stock" is not borne out by the evidence. Benton & Company never had the right to receive the stock—in fact they never did receive the stock certificates which were delivered to the plaintiff upon payment therefor. By the agreement with the plaintiff and by the partnership agreement all right, title and interest in the stock was disclaimed, and in addition the plaintiff was appointed the attorney-in-fact of the partnership so that even if the certificates were registered in the name of Benton & Company, the plaintiff at all times had the power to dispose of the certificates without even requesting Benton & Company to endorse the certificates, which, however, Benton & Company under the agreement with the plaintiff, agreed to do at all times upon request.

Whenever a person subscribes to stock of a corporation he as subscriber has the right upon payment to have the stock certificates issued either in his name or in the name of his nominee and not merely in his name alone; therefore, when such subscriber directs that the certificates be issued in the name of a nominee he is not giving up any right by transferring it to another, but merely stating how his original transaction of subscription shall be carried out. He is not foregoing an exclusive right to have the certificates issued in his name and thereby transferring this right to someone else by taking such a step. The step of having the stock issued in the name of a nominee is merely a completion of the transaction of issuance of the stock upon which the issue tax was paid and does not constitute a transfer of anything.

It has been stated that a disposition of the right to receive is not a test of taxability. It is only the transfer of the legal title of the right to receive, which the statute makes taxable, and there was no transfer of the legal title where the principle has a security registered in the name of a dummy and at all times retains possession and control of the certificates.

The transfer of title to a stock certificate under the law of New York is governed by Section 162 of the Personal Property Law of New York as follows:

> "Title to a certificate and to the shares represented thereby can be transferred only,
>
> "(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or
>
> "(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.
>
> "The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

Even if the shares be regarded as having been transferred to the nominee in trust for the plaintiff, under the

Real Property Law of New York, Section 93, which is equally applicable to personal property (*Matter of DeRycke*, 99 App. Div. 596; *Matter of Bell*, 141 Misc. 720), the trust was a dry or passive trust which under the statute vested title in the beneficiary, the plaintiff, immediately.

POINT II

The recent decision in the United States Supreme Court in the case of *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60, 80 Law. ed. 42, is distinguishable from this case.

The facts in the *Raybestos* case are stated in the opinion as follows (p. 42, Law. ed.):

> "Petitioner was organized under the laws of New Jersey as a step in carrying out a plan and agreement for the consolidation of three other corporations. Two of the corporations conveyed their property to petitioner in return for a specified number of its shares of capital stock, issued not to the two corporations, but directly to their stockholders in proportion to their holdings."

The liability for the tax levied on the original issue of the stock was conceded, but it was not conceded that the transaction involved any taxable transfer within the purview of Schedule (A) (3).

In rendering the opinion that there was a transfer tax, Mr. Justice Stone said at page 43, Law. ed.:

> "The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to

be or become a shareholder *or to receive any certificate of any interest in its property is surrendered by one and vested in another.* See *Provost* v. *United States*, 269 U. S. 443, 458, 459, 70 L. ed. 352, 356, 357; 46 S. Ct. 152. While the statute speaks of transfers, it does not require that the transfer shall be directly from the hand of the transferor to that of the transferee. It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another. Even the ownership of a share of stock, transfer of which is admittedly taxed, is not transferred directly from one to another as is title to a chattel or to real estate. Transfer of title to the shares is effected by a form of novation by which the right of the shareholder is surrendered to the corporation in return for its recognition of a new shareholder designated by the transferor and the issue to him of a new certificate of stock. *It is relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation.*" (Italics ours.)

No rights in the stock involved in this case, either legal or equitable, were surrendered by petitioner, or vested in its nominee.

The facts in the *Raybestos* case and in the *Provost* case show that there was a real double transfer of the legal title to and beneficial interest in stock which the taxpayers tried to short-cut by one transfer. Where a corporation sold its assets for stock, the following transactions occurred:

(1) The purchasing corporation issued its stock.

(2) The selling corporation was entitled in law to receive the stock and could either hold it in its treasury

or receive the stock constituting payment and then distribute the stock received among its own shareholders.

(3) In the case above specified, the selling corporation authorized the purchasing corporation to issue its stock not to the purchasing corporation *but directly to the stockholders of the seller.* In other words, there was a transfer not only of the legal title to and beneficial interest in the stock from the issuing corporation to the selling corporation, but an actual transfer of legal and beneficial interest in the stock and the right to receive the stock from the selling corporation to its stockholders.

In the instant case, Founders General Corporation never relinquished any ownership of the shares for the benefit of anyone else than Founders General Corporation. There was no resultant acquisition by Benton & Co. of any rights or ownership. Nothing was ever transferred to Benton & Co., not even the certificate representing the stock nor was the legal title or any beneficial interest therein vested in Benton & Co.

POINT III

The New York cases cited in the opinion below depend upon the New York statute, and are distinguishable both on the law and the facts.

These cases were *Bonbright & Co.* v. *State of New York,* 165 App. Div. 640, and *Travis* v. *Ann Arbor Co.,* 180 App. Div. 799, affirmed 227 N. Y. 640 without opinion.

The New York law construed in the *Bonbright* case imposed a tax upon any and all deliveries and transfers of

stock "whether investing the holder with the beneficial interest in or legal title to said stock * * * or merely with the possession or use thereof for any purpose" (New York Tax Law, Section 270). By agreement with a trust company, and in order to provide for the exercise of certain options to repurchase the stock, the trust company was vested with the legal title to 100,000 shares of stock for ten years, and the trust company was required to issue immediately to the owners of the 100,000 shares, certificates of beneficial interest. At the time of the execution of the agreement, the certificates of stock were physically delivered and the stamp tax paid: The certificate for 100,000 shares was surrendered and a new certificate issued to the trust company. The owners of certificates of beneficial interest for 71,308 shares, which were not under repurchase options, sued to recover the tax paid. This was clearly taxable. The transaction involved the transfer of the legal title to and the actual delivery and transfer on the books of certificates of stock.

Travis v. *Ann Arbor Co.* (*supra*) involved the transfer and cancellation and surrender of a stock certificate standing in the name of an accommodation holder and the issuance and delivery by the corporation of a new stock certificate in the name of a new accommodation holder. The *Ann Arbor* case would only be applicable if stock in the name of Benton & Co. had been surrendered to United States Electric Power Corporation and new certificates of stock in the place thereof issued in the name of, for instance, "Smith & Co.," a new nominee of the plaintiff. *There was a transfer on the books of the corporation from one stockholder to another.*

In addition it should be pointed out that Section 270 of the New York Tax Law as it existed November 27, 1922, was broader than the Federal statute under discussion, in that it applied to any and all deliveries or transfers of shares or certificates of stock *"whether investing the holder with beneficial interest in or legal title to such stock, or merely with the possession or use thereof for any purpose."* (Italics ours.)

Conclusion

Petitioner therefore respectfully prays that a writ of certiorari issue to review the decision of the Circuit Court of Appeals for the Second Circuit.

The attempted collection of a tax in this case has all of the elements which have so long condemned *ex post facto* laws in our jurisprudence.

In 1928 the United States District Court in the *Heiner* case, decided flatly that a transaction such as this was nontaxable. The United States failed to appeal, and for six years the decision stood unchallenged. During that time it was followed presumably by thousands of other taxpayers as well as the plaintiff. In the claim for refund made by the plaintiff it is stated not only that the tax liability and penalty assessed is not justified under the law, but that it is contrary "to the decision of the United States District Court for the Western District of Pennsylvania in *Union Trust Company* v. *Heiner,* 26 Fed. (2nd) 391, *upon which claimant relied in failing to pay a tax upon the alleged transfer at the time the stock was issued as aforesaid"* (Record, fol. 72).

The United States is attempting in this case to make a transaction taxable which, under the only judicial decision in existence at the time it occurred, was non-taxable. Every consideration of law and justice requires that the decision of the court below should be reversed.

The solicitor general has petitioned for a writ of certiorari in *United States* v. *A. B. Leach & Co.*, No. 331, September, 1936, and it is respectfully prayed that the cases, if the writs are granted, be heard together.

Respectfully submitted,

ROYAL E. T. RIGGS,
Counsel for Petitioner.

September, 1936.

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 398

FOUNDERS GENERAL CORPORATION, PETITIONER

v.

JAMES J. HOEY, COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case. The petition is based chiefly upon a conflict between the decision below and that of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *A. B. Leach & Co.*, 84 F. (2d) 908.

The Government has petitioned for certiorari in the *Leach* case, No. 331 of the present Term, and also in *Automatic Washer Co.* v. *United States*, 15

tions for certiorari, substantially the same question is involved. There are at this time pending in the courts approximately thirty cases involving transfer taxes on transactions where stock certificates were issued to nominees.

It is, therefore, believed that the question involved merits review by this Court, and we accordingly do not oppose the petition for writ of certiorari.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
SEWALL KEY,
GEORGE H. ZEUTZIUS,
Special Assistants to the Attorney General.

OCTOBER 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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In the Supreme Court of the United States

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FOUNDERS GENERAL CORPORATION, PETITIONER

v.

JAMES J. HOEY, COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE SECOND DISTRICT OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 27–34) is reported in 12 F. Supp. 290. The opinion of the Circuit Court of Appeals (R. 45–50) is reported in 84 F. (2d) 976.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1936 (R. 51). The petition for a writ of certiorari was filed September 25, 1936,

and was granted November 9, 1936. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner subscribed for original shares and accompanying warrants in A corporation. The certificate therefor was then issued by A, pursuant to petitioner's direction, in the name of B, who had agreed to hold them as petitioner's nominee. Did this transaction involve a taxable transfer within the meaning of Section 800, Schedule A–3 of the Revenue Act of 1926?

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra,* pp. 12–16.

STATEMENT

This action was brought by petitioner on November 28, 1934, for the recovery of $4,733.33 paid as documentary stamp taxes (R. 2–24). Respondent moved to dismiss the complaint and for judgment on the ground of failure to allege facts sufficient to state a cause of action (R. 25–26). The District Court sustained the motion and entered judgment for respondent and against petitioner on September 28, 1935 (R. 34–37). The Circuit Court of Appeals affirmed the judgment (R. 50).

The facts, as set forth in petitioner's complaint (R. 3–24), may be summarized as follows:

On September 10, 1929, petitioner entered into a written contract with the United States Electric Power Corporation, a Maryland corporation, whereby petitioner subscribed for 100,000 shares of the original issue of stock of the Power Corporation at $13.50 per share. Each share was to be accompanied by a warrant entitling the holder to subscribe for one additional share at $25 before January 2, 1940. (R. 3–4.)

The closing of the transaction by delivery of stock certificates with warrants attached, and payment therefor, was set for September 17, 1929. (R. 4.)

Subsequent to the subscription, but prior to the time fixed for closing the transaction, petitioner directed the Power Corporation to issue a single certificate for the stock in the name of Benton & Company, a co-partnership, petitioner's nominee. (R. 4.) These instructions were followed and the certificate was issued in the name of Benton & Company but delivered to petitioner, who paid the agreed subscription price. (R. 5–6.) Under a written contract executed in March, 1928 (R. 13–19) the petitioner was authorized, as agent and attorney for Benton & Company, to endorse the latter's name in effecting further transfers. (R. 16.) The sole business of Benton & Company was to take and hold in its name securities for the account of petitioner. (R. 9–10.) For acting as its nominee, petitioner paid Benton & Company an annual compensation of $1,500. (R. 14.)

The original issue tax on the shares was paid as required under Schedule A–2, Title VIII of the Revenue Act of 1926, and is not in dispute. In addition thereto, there was assessed in October, 1934, a transfer tax against petitioner in the sum of $4,733.33, under Schedule A–3 of the Act, in respect of the foregoing transaction upon the transfer by petitioner of "legal title to said stock or of the right to receive the same" (R. 6–7).

The assessment was paid and, on October 26, 1934, petitioner filed its claim for refund which was rejected on November 20, 1934 (R. 6–7).

SUMMARY OF ARGUMENT

Petitioner became a stockholder in the issuing corporation by virtue of its stock subscription. As a stockholder petitioner had the legal title to the shares. If petitioner did not become a stockholder until payment of the subscription price, at all events it had the sole right to receive the shares and certificate. Petitioner effectively transferred to its nominee its title or right to receive, by virtue of the direction that the stock certificate be issued in the name of the nominee and the compliance with that direction. The fact that the certificate was delivered to petitioner does not negative this conclusion. Such delivery was made pursuant to a power of attorney granted to petitioner as agent of its nominee. This arrangement only serves to confirm the fact that rights were transferred to the nominee.

Under the New York stock transfer tax statute, it has been held that the issuance of a stock certificate in the name of an accommodation endorser at the direction of the beneficial owner constitutes a transfer of the legal title to the shares. *Travis* v. *Ann Arbor* Co., 180 App. Div. 799, affirmed, 227 N. Y. 640.

As is pointed out in the Government's brief in *United States* v. *A. B. Leach & Co., Inc.*, No. 331, present term, the argument of taxpayer is an attempt to read into the statute an exemption which Congress has not seen fit to make. Amendments to the 1926 Act have exempted a limited class of nominee transactions, involving nominees of fiduciaries and brokers. The failure of Congress to enlarge these exemptions indicates that a transaction of the type here involved is intended to come within the general provisions of the Act.

ARGUMENT

Petitioner, by subscribing on September 10, 1929 for original shares of the United States Electric Power Corporation, became a stockholder of that corporation. It is generally held, in the absence of statutory or contractual provisions to the contrary, that a subscriber to an original issue of stock becomes a shareholder upon acceptance of the subscription, even though the price has not been paid or certificates delivered. *Reagan* v. *Midland Packing Co.*, 298 Fed. 500 (N. D. Iowa), affirmed with-

out passing on this point, 8 F. (2d) 954 (C. C. A. 8th); *Wheeler* v. *Millan*, 99 N. Y. 353; Morawetz, *Private Corporations* (2d Ed.), Sec. 56. Some courts have drawn a distinction in this regard between shares in a newly formed corporation and shares in an existing corporation, *cf. Baltimore City Ry. Co.* v. *Hambleton*, 77 Md. 341, 346, but the distinction is of no moment here, for the subscription was for shares in a corporation then being organized.[2] The stamp-tax regulations likewise recognize that stock may be issued by virtue of a stock subscription. Article 77 (b) of Treasury Regulations 71, relating to stamp taxes imposed by Title VIII of the Revenue Acts of 1926 and 1928, provides: "The term 'issue' includes not only actual delivery of, but also acceptance of subscriptions to shares or certificates of stock * * *."

As a stockholder on September 10, 1929, petitioner had the sole right to receive the stock certificates, and the right to transfer legal title to the stock, to the certificates, and to the right to receive the certificates. The subsequent direction by petitioner that the certificate be issued in the name of Benton & Company, and the compliance with that direction, necessarily involved a transfer by

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[2] The certificate evidencing the shares is described in the bill of complaint as "a certificate of original issue" (R. 5). Reference to Moody's Manual of Public Utilities discloses the fact that the United States Electric Power Corporation was incorporated under the laws of Maryland on September 10, 1929, the date of petitioner's subscription.

petitioner of its shares and the right to receive the certificate therefor.

Even if petitioner did not become a stockholder upon entering into the subscription agreement, it had at that time the right to become a stockholder and to receive the shares and certificate therefor upon payment of the subscription price. These rights were transferred within the meaning of the Act. As the Circuit Court of Appeals pointed out, it is not requisite that the rights transferred be unconditional at the time of transfer (R. 18).

It is true that the certificate was delivered to petitioner, and not to Benton & Company, its nominee. But such delivery does not negative the fact that Benton & Company had been given legal title and the right to receive the shares and certificates by virtue of the issuance thereof in its name. The delivery to petitioner was made pursuant to an agreement between it and its nominee. Petitioner received the certificate as agent of Benton & Company. The collateral agreement between petitioner and its nominee could not affect the rights possessed by the latter with respect to third parties. The certificate was unavailable for transfer until endorsed by Benton & Company or by petitioner as agent of the latter under the power of attorney contained in their agreement. The use of a nominee was admittedly for the purpose of facilitating transfers of title to third parties. If the nominee did not possess title or the right to receive the shares and certificate, it is difficult to

see how it could, in turn, transfer these to others. The entire arrangement fortifies, instead of weakening, the conclusion that there was a transfer by petitioner to its nominee.

Petitioner contends (brief in support of petition, p. 20) that there was no transfer "of anything" by petitioner because as subscriber it had the right to have the certificates issued either in its name or in that of another, and therefore there was but one transaction. But a similar argument could have been made in *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60. There, the old corporation had the right, upon conveyance of its assets, to receive the new shares or to direct their issuance in the name of its stockholders. The latter course involved a taxable transfer.

Travis v. *Ann Arbor Co.,* 180 App. Div. 799, affirmed, 227 N. Y. 640, cited by the Circuit Court of Appeals, supports the decision in the instant case. There, the defendant corporation was the owner of certain shares for which the stock certificate had been issued in the name of an individual. Subsequently the defendant directed that the certificate be canceled and a new certificate issued in the name of another. This was done, and the defendant's nominee endorsed the new certificate in blank and left it with the transfer agent of the stock, where it remained subject to the order of the defendant. There was no change in the defendant's beneficial ownership of the stock from the

time of its original purchase. Upon these facts the court held that two transfer taxes were payable, one with respect to the issuance of the new certificate in the name of defendant's nominee, and one in respect of the nominee's endorsement in blank. The statute under which these taxes were imposed was less broad than the Federal Act, for it taxed transfers of legal title to shares or certificates, but not legal title to the right to receive them. The Appellate Division of the New York Supreme Court said (p. 801):

> When the defendant caused the certificate of stock owned by it to be canceled and a new certificate of stock to be issued in the name of Harrison, it thereby caused the legal title to the stock to be transferred to him; and when Harrison indorsed the certificate of stock in blank, and left it with the trust company for the defendant, he transferred the legal title to the stock to whomsoever might be the holder thereof. Hence there accrued two taxable transfers. The application of any other rule would be opposed to the plain wording of the statute, and furnish in many cases an easy method of evasion of the tax.

It is to be noted that in the *Ann Arbor* case, as here, the transferee did not receive delivery of the certificate and had no beneficial interest in the shares. The mere fact that the stock certificate was issued in his name pursuant to the direction of the bene-

ficial owner constituted a taxable transfer of legal title by the owner to its nominee. The endorsement by the nominee in blank as part of the arrangement, so far from negativing a transfer of title to the nominee, constituted a separate transfer. In the present case, as the court below pointed out, it is only necessary to show that the nominee was given the right to receive the shares or the certificate.

The present case closely resembles *United States* v. *A. B. Leach & Co., Inc.*, pending on writ of certiorari, No. 331. The arguments advanced in the Government's brief in that case concerning the scope of the taxing Act are applicable here. We have there shown that the existence of a beneficial interest in the transferee is not a requisite under the statute. We have also shown that the course of amendment to the 1926 Act, notably in 1932 and 1936, points to the conclusion that nominee transactions of the present type are intended to be covered by the general provisions of the Act. Those amendments exempted nominee transactions in limited classes of cases involving fiduciaries and brokers. The arguments on these points in the Government's brief in the *Leach* case will not be repeated here, but reference thereto is respectfully made.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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SEWALL KEY,
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GEORGE H. ZEUTZIUS,
Special Assistants to the Attorney General.

JANUARY 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101:

TITLE VIII.—STAMP TAXES

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title * * *. (U. S. C., Title 26, Sec. 900.)

SCHEDULE A—STAMP TAXES

* * * * *

2. Capital stock, issue: On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents: *Provided,* That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent on each $20 of actual value, or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further*, That in case of sale where the evidence of transfer is shown only by the books of the corporation the stamp shall be placed upon such books; and

where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. Any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale, or who in pursuance of any such sale delivers any certificate or evidence of the sale of any stock, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both. (U. S. C., Title 26, Sec. 902.)

Treasury Regulations 71, approved July 7, 1928, promulgated under the Revenue Act of 1926:

ART. 31. *Basis of tax.*—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to shares, or certificates of stock, or of profits, or of interest in property or accumulations in any cor-

poration, joint stock company, or association, or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

ART. 34. *Sales and transfers subject to tax.* The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

* * * * *

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

* * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

ART. 77. *Further definitions.*—(1) When used in these regulations:

* * * * *

(b) The term "issue" includes not only actual delivery of, but also acceptance of subscriptions to shares or certificates of stock, or of profits or of interest in property or accumulations in any corporation, joint-stock company, or association.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

Nos. 398, 331 and 330.—October Term, 1936.

398	Founders General Corporation, Petitioner, *vs.* James J. Hoey, Collector, etc.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
331	United States, Petitioner, *vs.* A. B. Leach & Co., Inc.	On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
330	United States, Petitioner, *vs.* Automatic Washer Company.	On Certiorari to the Court of Claims.

[March 1, 1937.]

Mr. Justice Brandeis delivered the opinion of the Court.

These three cases present, in the main, the same question: When, at the instance of one entitled to receive stock, the certificates therefor are, at his request and for his convenience, issued by the corporation in the name of a nominee who receives no beneficial interest therein, does the transaction involve a transfer by the beneficial owner requiring a documentary stamp pursuant to Section 800, Schedule A-3, of the Revenue Act of 1926, February 26, 1926, c. 27, Title VIII, 44 Stat. 99, 101?

The taxpayers seek to recover the amounts alleged to have been wrongfully exacted for the tax, with interest and penalties. In No. 398, the claim of Founders General Corporation for $4,733.33, was denied by the Circuit Court of Appeals for the Second Circuit, 12 F. Supp. 290; 84 F. (2d) 976. In No. 331, the claim of A. B. Leach & Co., Inc., for $16,526.40 was allowed by the Circuit Court of Appeals for the Seventh Circuit. 84 F. (2d) 908. In No. 330, the claim of Automatic Washer Company for $1,593.63 was allowed by the Court of Claims, 15 F. Supp. 70. Because of the conflict, we granted certiorari. 299 U. S. —.

1. In the suit brought by the Founders Corporation, the complaint, setting forth the following facts, was dismissed: On September 10, 1929, that corporation agreed with the United States

Electric Power Corporation to subscribe for 100,000 shares of its common stock, to be delivered on September 17th, each share to be accompanied by a warrant entitling the holder to subscribe before January 2, 1940 for an additional share. After making the agreement and before delivery of the shares, the Founders Corporation directed that the securities be issued in the name of Benton & Co., as its nominee. Benton & Co. was a partnership, organized in 1928 solely to hold in its name securities belonging to the plaintiff, and to transfer them at plaintiff's request. For acting as nominee, the partnership received from plaintiff an annual fee of $1500. By contract between Benton & Co. and plaintiff, neither the partnership nor any member thereof could claim any beneficial interest in any securities held by the firm, and plaintiff was appointed agent of Benton & Co. for the sale and transfer of securities registered in the partnership name. The stock issued by the Electric Power Corporation in the name of Benton & Co. was delivered to the Founders Corporation.

Stamp taxes were confessedly payable on the original issue, and on the transfer of any securities from Benton & Co. to the public. The only tax challenged is that upon the alleged transfer by plaintiff to Benton & Co. of the right to receive the stock of the Electric Power Corporation.

2. In the suit brought by A. B. Leach & Co., Inc., the declaration upon demurrer to which the recovery was had, set forth the following facts: That concern, being engaged in the business of selling securities to the public, organized five corporations; subscribed for all their stock; and directed that the stock be issued in the name of Vercouter, an employee. It is conceded that he had no beneficial interest in the stock; had no authority to act except as directed by A. B. Leach & Co., Inc.; and received the certificates solely for its benefit and convenience in connection with future sales to the public.

Stamp taxes were confessedly payable on the original issue, by the five corporations. The only tax challenged is that upon the alleged transfer by the taxpayer to Vercouter of the right to receive the stock of the five corporations.

3. In the suit brought by Automatic Washer Company, the facts found on which recovery was allowed are these: An agreement, dated June 22, 1928, between Folds, Buck & Company, bankers, and

Nelson, a stockholder and officer of the Washer Company's corporate predecessor, provided that Nelson proposed to cause the latter concern to be reorganized as a Delaware corporation which should acquire the assets and assume the liabilities of the old company; that the new company should issue therefor 140,000 shares of common and 40,000 shares of preferred; and that the bankers should have the option of acquiring for $1,000,000 40,000 shares of the common and 40,000 shares of the preferred. On September 17, 1928, the stockholders of the old company agreed with Nelson to contribute ratably the shares in the new which were to be sold to the bankers. To this end, each irrevocably appointed Nelson and one Gallagher attorneys in fact to receive the stock of the new company and to make sale thereof to the bankers. The new company, the taxpayer, was organized. On September 27, 1928, the two companies agreed that the assets should be transferred to the new in consideration of its issuing its common and preferred stock to the stockholders of the old. The agreement recited the arrangement with the bankers and that:

"In order to carry out this plan . . . each of the stockholders of the Old Company has irrevocably constituted and appointed H. E. Nelson and W. N. Gallagher his attorneys in fact to receive the respective securities of the New Company to which such stockholder may be entitled and to make sale of that portion thereof to be contributed by such stockholder for the purpose of carrying out said agreement of sale with the Bankers. . . . Accordingly, the New Company . . . shall issue such certificates in such names and for such amounts as shall be specified in the joint order of the said H. E. Nelson and W. N. Gallagher, the attorneys in fact . . . , and deliver the same to said attorneys in fact . . ."

The 74,538 shares designed to be sold to the bankers were issued to Nelson.[1] Of these, 13,173 were the pro rata contribution of Nelson.

The taxpayer concedes now that stamp taxes were payable on the original issue of all the stock by the new company; on the old company's transfer to its stockholders (including Nelson) of its right to receive the new company's stock; on Nelson's transfer to the bankers; and on the bankers' sales to the public. The

[1] In the eventual determination of the pro rata contribution by the old company's stockholders to the stock to be sold to the bankers, the amount of preferred to be sold was reduced to 34,538 shares. See 15 F. Supp. 70, 74.

Government concedes now that taxes are not payable on Nelson's alleged transfer to himself of his 13,173 shares which were to go to the bankers. The tax challenged is that on the alleged transfer to Nelson of the right to receive the 61,365 shares which the other stockholders contributed.

The applicable part of Section 800, Schedule A—Stamp Taxes, is as follows:

"3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further,* That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts . . . ."

First. In each case, the person originally entitled to receive the certificate directed, for his own convenience and purposes, that it be issued in the name of a nominee. It is argued in the *Automatic Washer Company* case, that the stockholders of the old company never acquired the "right to receive" that portion of their stock which was designed for transfer to the bankers; that they did not become entitled to receive shares in the new company until the contract with it was made on September 27th; that prior thereto, they had irrevocably agreed that Nelson should receive and sell the shares which were to go to the bankers; and that, thus, the stockholders of the old company had, prior to the original issue of the

stock in the new, relinquished "the power to command the disposition of the shares" and, therefore, never exercised that power, held taxable in *Raybestos-Manhattan, Inc.* v. *United States*, 296 U. S. 60. But essentially the same argument was made and rejected in the *Raybestos* case, page 62. There the transaction was held to have involved a taxable transfer of rights to stock, though the old companies had no right to the stock in the consolidated company prior to the execution of the contract whereby the issue to their stockholders was directed. "The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements." *Id.*, 63. Compare *Helvering* v. *Midland Mutual Life Insurance Co.*, — U. S. —. The situation here is in substance the same as in the *Raybestos* case. When the powers of attorney were executed, there was nothing upon which they could operate. The rights to receive the stock in the new company, and the transfer thereof, were effected at one time by the same document.

Second. It is true that in none of the three cases did the transaction involve the transfer of a beneficial interest. But that fact is, in view of the language of the Act, without legal significance. The tax is exacted because the taxpayer transferred "the right to receive" the certificate. Likewise it is without legal significance that, under power of attorney from nominee to beneficial owner, the former may have no part in the management or disposal of the securities. Nor is it material that in no case did the nominee have a right, at least as against the taxpayer, to compel issuance of the stock to himself. The legal title to the shares was received by the nominee from the newly formed corporation; but the authorization rendering his holding lawful was received from the taxpayer. The legality of the issuance of the stock in the names of the nominees rests on the fact that the taxpayers authorized such issuance and granted their nominees the right to receive the stocks entered in their names. The grant of that authority is a transfer of "the right to receive" within the meaning of the Act; and we are not to look beyond the Act for further criteria of taxability. See *Burnet* v. *Harmel*, 287 U. S. 103, 110.

The statute defines the scope of the tax in terms whose breadth is emphasized by the careful particularity of its provisos. Especially indicative of Congressional intention that nominee transactions generally should be subject to the tax are the provisos added by the

Revenue Act of 1932, June 6, 1932, c. 209, § 723, 47 Stat. 273, and the Act of June 29, 1936, c. 865, 49 Stat. 2029, which except certain specifically described tranfers to nominees.

Third. It is suggested that in each case the taxpayer might have attained his ultimate purpose by a form of transaction which would not have subjected him to the tax. The suggestion, if true, furnishes no reason for relieving him of tax when, for whatever reason, he chooses a mode of dealing within the terms of the Act. Compare *United States* v. *Isham,* 17 Wall. 496, 506; *Provost* v. *United States,* 269 U. S. 443, 457, 458. To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty. "There must be a fixed and indisputable mode of ascertaining a stamp tax." *New York,* ex rel. *Hatch,* v. *Reardon,* 204 U. S. 152, 159.

In Number 398, judgment affirmed.
In Number 331, judgment reversed.
In Number 330, judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 331

THE UNITED STATES OF AMERICA, PETITIONER

vs.

A. B. LEACH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1936

CERTIORARI GRANTED, OCTOBER 19, 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 331

THE UNITED STATES OF AMERICA, PETITIONER

vs.

A. B. LEACH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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[Placita omitted in printing.]

In United States District Court, Northern District of Illinois, Eastern Division

No. 42612

A. B. LEACH & CO., INC., A CORPORATION, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

Petitioner's declaration

Filed Sept. 11, 1933

To the Honorable, the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

I

Your petitioner, A. B. Leach & Co., Inc., complains to the United States of America in a plea of trespass on the case upon promises, to recover internal revenue taxes illegally assessed, which your petitioner aforementioned alleges it was illegally and erroneously compelled to pay to the United States of America under duress, as hereinafter mentioned.

II

Your petitioner alleges that it is a corporation duly organized under the laws of the State of New York in April 1917 and
3 duly licensed to do business in the State of Illinois in July 1917 under the name of A. B. Leach & Co., Inc., and has so conducted business under said name until April 1932, from which time said corporation has been and is now in process of liquidation; that while actively engaged in business it sold stocks, bonds, and other securities to the general public for investment.

III

Your petitioner further alleges that in the month of August 1931 the United States Commissioner of Internal Revenue at Washington, D. C., made an illegal, erroneous, and void assessment against petitioner, amounting to Four thousand nine hundred ninety four dollars ($4,994.00), representing stamp tax on the alleged transfer by petitioner to one George I. Vercouter of the right to receive certain shares of Henney Motor Company and its successor company, Allied Motor Industries, Inc., as follows, to-wit:

Date	Number of shares	Name of Company	Par Val.	Tax
12- 9-27	30,000 Common	Henney Motor	No Par	$600.00
12- 9-27	16,500 Pref.	Henney Motor	No Par	330.00
12-28-27	91,500 Common	Henney Motor	No Par	1,830.00
9-25-28	19,700 Common	Henney Motor	No Par	394.00
10-10-28	7,500 Common	Henney Motor	No Par	150.00
12-15-28	7,500 Common	Henney Motor	No Par	150.00
12-31-28	33,000 Common	Allied Motors, Ind	No Par	660.00
12-31-28	3,000 Common	Allied Motors, Ind	No Par	60.00
12-31-28	1,000 Common	Allied Motors, Ind	No Par	20.00
1-30-29	10,000 Common	Allied Motors, Ind	No Par	200.00
6- 1-29	10,000 Common	Allied Motors, Ind	No Par	200.00
7-19-29	20,000 Common	Allied Motors, Ind	No Par	400.00
				4,994.00

that on account of said illegal, erroneous, and void assessment petitioner paid on December 1, 1931, to the Collector of Internal Revenue, First District of Illinois, located at Chicago, Illinois, the sum of Four thousand nine hundred ninety four dollars ($4,994.00), which said payment was made by petitioner, A. B. Leach & Co., Inc., to the respondent under protest; that in the month of August, 1931,

4 the United States Commissioner of Internal Revenue at Washington, D. C., made an illegal, erroneous, and void assessment against petitioner amounting to the sum of Two thousand dollars ($2,000.00), representing stamp tax on the alleged transfer by petitioner to one George I. Vercouter of the right to receive One hundred thousand shares of Participating Class "A" stock of Mid-Continent Laundries, Inc.; that on account of said illegal, erroneous, and void assessment petitioner paid on December 1, 1931, to the Collector of Internal Revenue, First District of Illinois, located at Chicago, Illinois, the sum of Two thousand dollars ($2,000.00), which said payment was made by the petitioner, A. B. Leach & Co., Inc., to the respondent under protest; that in the month of September 1931 the United States Commissioner of Internal Revenue at Washington, D. C., made an illegal, erroneous, and void assessment against petitioner amounting to the sum of Thirteen hundred dollars ($1,300.00), representing stamp tax on the alleged transfer by petitioner to one George I. Vercouter of the right to receive sixty-five thousand shares of Class "A" stock of the Van Sicklen Corporation; that on account of said illegal, erroneous, and void assessment petitioner paid on January 2, 1932, to the Collector of Internal Revenue, First District of Illinois, located at Chicago, Illinois, the sum of Thirteen hundred dollars ($1,300.00), which said payment was made by the petitioner, A. B. Leach & Co., Inc., to the respondent under protest; that in the month of September 1931 the United States Commissioner of Internal Revenue at Washington, D. C., made an illegal, erroneous, and void assessment against petitioner amounting to the sum of Eight thousand dollars ($8,000.00), representing stamp tax on the alleged transfer by petitioner to one George I. Vercouter of the right to receive three hundred thousand shares of Class "A" stock and one hundred thousand shares of Class "B" stock of the Great Lakes Aircraft Corporation; that on account of said illegal, errone-

ous, and void assessment, petitioner paid on January 2, 1932, to the Collector of Internal Revenue, First District of Illinois, located at Chicago, Illinois, the sum of Eight thousand dollars ($8,000.00), which said payment was made by the petitioner, A. B. Leach & Co., Inc., to the respondent under protest; that in the month of September 1931 the United States Commissioner of Internal Revenue of Washington, D. C., made an erroneous, illegal, and void assessment against petitioner amounting to the sum of Two hundred thirty two and $^{40}/_{100}$ Dollars ($232.40), representing stamp tax on the alleged transfer by petitioner to one George T. Vercouter of the right to receive eleven thousand six hundred twenty warrants to subscribe for Partieipating Class "A" stock of Mid-Continent Laundries, Inc.; that on account of said illegal, erroneous, and void assessment, petitioner paid on January 2, 1932, to the Collector of Internal Revenue, First District of Illinois, located at Chicago, Illinois, the sum of Two hundred thirty two and $^{40}/_{100}$ Dollars ($232.40), which said payment was made by the petitioner, A. B. Leach & Co., Inc., to respondent under protest.

IV

Your petitioner further alleges that said illegal, erroneous, and void assessments were made by the respondent under Schedule A–3, Title 8 of the Revenue Act of 1926, assessing a tax of two cents on each $100.00 of face value or fraction thereof, on all sales, or agreements to sell or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest or rights, or not.

V

Your petitioner alleges that the corporations specified in Paragraph III hereof, namely, Henney Motor Company, its successor, Allied Motor Industries, Inc., Mid-Continent Laundries, Inc., Van Sicklen Corporation, and Great Lakes Aircraft Corporation were organized by your petitioner, A. B. Leach & Co., Inc., and that upon the organization of said corporations, your petitioner subscribed for all of the capital stock specified in said Paragraph III hereof, said capital stock being the original issue of said corporations, and your petitioner paid thereon a stamp tax of five cents on each share as required under Schedule A–2, Title 8 of the Revenue Act of 1926; that immediately on the completion of the organization of said corporations, the said stock so subscribed for was issued in the

6 name of said George I. Vercouter; that said George I. Vercouter was the mere employe and agent of your petitioner, appointed to receive and hold the capital stock of said corporations as specified in Paragraph III hereof for the sole and exclusive benefit of your petitioner, and for its convenience in connection with future sales and transfers of said stock to the public; that by virtue of the foregoing, the subscription of said stock by your petitioner and the issuance thereof in the name of said George I. Vercouter, constituted but one transaction, taxable only under Schedule A–2, Title 8 of the Revenue Act of 1926, relating to original issues of stock; and that said Schedule A–3, Title 8 of the Revenue Act of 1926, under which the taxes sought to be refunded were assessed, has no application to the transaction above recited.

VI

Your petitioner alleges that because of the facts above stated no stamp tax was authorized by law upon the alleged transfer by your petitioner to the said George I. Vercouter of the right to receive said stock and that the assessments were illegal, erroneous, and void.

VII

Your petitioner alleges that on, to-wit, October 8, 1932, petitioner duly filed with the Collector of Internal Revenue at Chicago, Illinois, on Forms No. 843, according to the provision of the law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, claims for refund of said taxes so illegally and erroneously assessed and collected from it; that on the 18th day of March 1933 the Commissioner of Internal Revenue made a final decision denying the said claims for refund and in a letter of that date so informed your petitioner.

VIII

Your petitioner further alleges that the Collector of Internal Revenue now in office is one Gregory T. Van Meter, which Collector is not the same individual that was in office at the time of the payment of the taxes aforementioned by your petitioner during the years 1931 and 1932.

IX

Your petitioner contends that the action of the Commissioner of Internal Revenue in not allowing the full refund of Four thousand nine hundred ninety-four dollars ($4,994.00), Two thousand dollars ($2,000.00), Thirteen hundred dollars ($1,300.00), Eight thousand dollars ($8,000.00), and Two hundred thirty-two and 40/100 Dollars ($232.40), respectively, as per its letter under date of March 18, 1933, on the ground that petitioner subscribed for the stock involved and

directed that it be issued in the name of its nominee; that the nominee therefore received the legal title to the stock which petitioner had the right to receive and such transfer of the right to receive is subject to the tax, is arbitrary, illegal, and unwarranted.

Wherefore your petitioner prays that judgment may be entered upon the facts and the law in the premises in the amount of Sixteen thousand five hundred twenty-six and 40/100 Dollars ($16,526.40), with interest from the date of payment as provided by the provisions of the Revenue Act of 1928, now in force and effect, relating to interest on tax refunds; and your petitioner further prays that such further relief should be allowed the petitioner as to this Honorable Court may seem just and equitable under the premises.

A. B. LEACH & CO., INC.,
By H. ALLPORT,
Petitioner.

[Duly sworn to by H. Allport; jurat omitted in printing.]

8 In United States District Court

Demurrer

Filed Dec. 9, 1933

And the defendant, the United States of America, by Dwight H. Green, United States Attorney for the Northern District of Illinois, its attorney, comes and defends, etc., when, etc., and says that the said petition or declaration and the matters therein contained in manner and form as the above are set forth are not sufficient in law for the plaintiff to maintain its aforesaid action, and that it, the defendant, is not bound by law to answer the same, and this it is ready to verify.

DWIGHT H. GREEN,
United States Attorney for the Northern District of Illinois.

In United States District Court

Memorandum

Filed July 16, 1935

On the authority of Union Trust Co. v. Heiner, 26 Fed. (2d) 391, Dean v. Caldwell & Co., 9 Fed. Supp. 177, and Consolidated Equities, Inc. v. White, 7 Fed. Supp. 851, the court is of the opinion that the plaintiff should recover.

WILLIAM H. HOLLY,
U. S. District Judge.

9 In United States District Court

Judgment

Entered Nov. 22, 1935

This cause having come on to be heard upon complaint of Petitioner and the demurrer thereto filed by the Respondent, and the cause having been submitted to the Court as an issue of law developed in oral argument and in briefs filed by the respective parties, and the Court having carefully considered the allegations of said complaint, and the facts involved in the claim of the Petitioner as presented to the Court in said pleadings and in the oral argument and in the briefs as filed, and the Court having filed herein its written opinion concluding that the Petitioner is entitled to a recovery in accordance with the prayer of its petition, and the Defendant having elected in open Court to stand on the record, and having declined to plead further, and the merits of the claim of the Petitioner having been satisfactorily established before the Court, and the Court being otherwise fully informed in the Premises,

It is Hereby Ordered, Adjudged And Decreed that the Petitioner do have and recover of the Defendant the sum of Sixteen Thousand Five Hundred Twenty-Six and 40/100 Dollars ($16,526.40) together with interest at the rate of six per cent (6%) per annum from December 1, 1931 on Six Thousand Nine Hundred Ninety-four Dollars ($6,994) and from January 2, 1932, on Nine Thousand Five Hundred Thirty-Two and 40/100 Dollars ($9,532.40) to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue, to the entry of which the Defendant is allowed an exception.

Enter:

WILLIAM H. HOLLY,
Judge of the United States District Court.

10 In United States District Court

Respondent's exceptions

Filed Dec. 3, 1935

Comes now the respondent, United States of America, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, Eastern Division, and files its written exceptions to the refusal and failure of the Court to enter its order in the above entitled cause sustaining respondent's demurrer to petitioner's declaration and dismissing such declaration at petitioner's costs, and to the order of judgment entered herein by the Court in favor of the petitioner and against the respondent on November 22, 1935, as follows:

I

Respondent excepts to the refusal and failure of the Court to enter its order in the above entitled cause sustaining respondent's demurrer to petitioner's declaration and dismissing such declaration at petitioner's costs, on the ground that:

Petitioner's declaration fails to allege facts sufficient to constitute a cause of action against respondent, in that the facts alleged in petitioner's declaration, if admitted, are not sufficient to constitute a cause of action against respondent, or sustain a conclusion of law that petitioner is entitled to a recovery in accordance with the prayer of its petition, or a judgment in any sum against respondent.

II

Respondent excepts to the order of the Court, entered in the above entitled cause, if any, overruling respondent's demurrer to petitioner's declaration on the ground that:

Petitioner's declaration fails to allege facts sufficient to constitute a cause of action against respondent, in that the facts alleged in petitioner's declaration are not sufficient to sustain the conclu-
11 sion of law, "that the petitioner is entitled to a recovery in accordance with the prayer of its petition," or the judgment entered in favor of petitioner and against the respondent on November 22, 1935.

III

Respondent excepts to the order of judgment, entered in the above entitled cause on November 22, 1935, against respondent and in favor of the petitioner in the sum of $16,526.40 and interest as therein provided, in that such judgment is not supported or sustained by the facts alleged in petitioner's declaration.

IV

Respondent excepts to the order of judgment, entered in the above entitled cause on November 22, 1935, against respondent and in favor of the petitioner in the sum of $16,526.40 and interest as therein provided, in that such judgment is predicated upon the erroneous conclusion, "that the petitioner is entitled to a recovery in accordance with the prayer of its petition", and the allegations of fact set forth in petitioner's declaration admittedly show that transfers of legal title to, or rights to receive legal title to, shares or certificates of stock, or of interests in property, or accumulations, in the corporations mentioned in such declaration, or to rights to subscribe for, or to receive, such shares or certificates, are involved and were effected by the parties to the transactions described therein, within the purview of Section 800 and Schedule A–3, Title VIII, of the Revenue Act of 1926.

V

Respondent excepts to the order of judgment, entered on November 22, 1935, against respondent, in that such judgment is not supported by any proof of the facts alleged as required by the provisions of Section 763, Title 28, United States Code (24 Stat. 506).

VI

Respondent excepts to the order of judgment, entered on November 22, 1935, against respondent and in favor of the petitioner,
12 in the sum of $16,526.40 and interest as therein provided, in that such judgment is not supported by any findings of fact and conclusions of law as required by the provisions of Section 764, Title 28, United States Code (24 Stat. 506).

VII

Defendant excepts to the order of judgment, entered on November 22, 1935, against respondent and in favor of petitioner, in that the conclusion, "that petitioner is entitled to a recovery in accordance with the prayer of its petition", is not sufficient to sustain such judgment against respondent in any sum.

M. L. IGOE,
United States Attorney.

In United States District Court

Motion to vacate

Filed Dec. 5, 1935

Comes now the respondent, United States of America, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, Eastern Division, and moves the Court to vacate and set aside the order of judgment, entered in the above entitled cause November 22, 1935, in favor of the petitioner and against the respondent, and to enter judgment herein in favor of the respondent and against the petitioner, dismissing petitioner's declaration at petitioner's costs, on each of the following grounds:

I

The judgment, entered on November 22, 1935, in favor of the petitioner and against the respondent in the sum of $16,526.40 and interest as therein provided, is not supported by the facts alleged in petitioner's declaration.

13 II

The allegations of fact set forth in petitioner's declaration are not sufficient to sustain the judgment, entered on November 22, 1935, in favor of the petitioner and against the respondent, United States of America, in any sum.

III

The judgment, entered on November 22, 1935, in favor of petitioner and against respondent is predicated upon the erroneous conclusion, "that the petitioner is entitled to a recovery in accordance with the prayer of its petition", in that the allegations of fact set forth in petitioner's declaration admittedly show that transfers of legal title to, or rights to receive legal title to, shares or certificates of stock, or of interests in property, or accumulations, in the corporations mentioned in such declaration, or to rights to subscribe for, or to receive, such shares or certificates, are involved and were effected by the parties to the transactions described therein.

IV

The judgment entered in favor of petitioner and against respondent is not supported by any proof the facts alleged as required by the provisions of Section 763, Title 28, United States Code (24 Stat. 506).

V

The judgment entered in favor of petitioner and against respondent is not supported by any findings of fact and conclusions of law as required by the provisions of Section 764, Title 28, United States Code (24 Stat. 506).

VI

The conclusion of law, "that petitioner is entitled to a recovery in accordance with the prayer of its petition", is not sufficient to sustain the order of judgment, entered herein on November 22, 1935, against respondent in any sum.

M. L. IGOE,
United States Attorney.

14 CITATIONS

In support of the above motion, the respondent cites the following case: Raybestos-Manhattan, Inc., v. United States, decided by United States Supreme Court on November 11, 1935, not yet officially reported, but found in Prentice-Hall, 1935, Vol. 1, p. 2173; F. T. Dooley Lumber Co. v. United States, 63 F. (2d) (C. C. A. 8th), Certiorari denied, 290 U. S. 640; United States v. Phillips, 24 F. (2d) 195 (C. C. A. 3d); United States v. Tisdale, 114 Fed. 883 (C. C. A. 5th); and United States v. Kelly, 89 Fed. 946 (C. C. A. 9th).

In the event the Court overrules the above motion to vacate the judgment entered on November 22, 1935, respondent requests that it be allowed exceptions to such ruling on each of the grounds set forth in the above motion.

In United States District Court

Order overruling motion to vacate

(Dec. 5, 1935)

This day comes the United States of America by the United States Attorney and enters herein its motion to vacate and set aside the judgment entered herein November 22 A. D. 1935, and to enter a judgment in favor of the Respondent and against the Petitioner and to dismiss this cause at Petitioner's costs, which motion is overruled and denied, to which ruling of the Court the United States of America by the United States Attorney duly excepts.

15 In United States District Court

Notice of appeal

Filed Dec. 6, 1935

To E. J. BLAIR, Esq., 1213,
#77 W. Washington St.,
BOWDEN & HEFFERNAN, 2800,
105 W. Adams Street,
Chicago, Illinois.

The defendant, the United States of America, hereby serves its notice that it will appeal from the decision or judgment entered in the above-entitled cause on November 22, 1935.

M. L. Igoe
M. L. IGOE,
United States Attorney.

Received a copy of the above and foregoing Notice of Appeal this 6 day of December, A. D. 1935.

E. J. Blair
E. J. BLAIR.
GEO. K. BOWDEN
BOWDEN & HEFFERNAN.

In United States District Court

Petition for appeal

Filed Dec. 6, 1935

To the Honorable William H. Holly, Judge of the District Court aforesaid.

The respondent, United States of America, by its Attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, Eastern Division, respectively shows that on the 22nd day of November, A. D. 1935, a final judgment was entered against your

petitioner, United States of America, and in favor of A. B. Leach & Co., in the sum of $16,526.40, together with interest at
16 the rate of 6% per annum on $6,994.00 from December 1, 1931, and on $9,532.40 from January 2, 1932, as provided by statute.

This is a suit to recover an internal revenue tax, wherein the laws of Congress providing for internal revenue are involved, tried in conformity with the provisions of the Act of Congress of March 3, 1867, c. 359, Sec. 1 and 2; 24 Stat. 505; Section 41 (20), Title 28, United States Code, and this case is one in which under the legislation and laws of the United States in force when the Act of Congress of January 31, 1928 (28 U. S. C. A., Section 861 (a) and 861 (b) was passed, a review could be had on writ of error.

Your petitioner feeling itself aggrieved by said judgment, as aforesaid, hereby petitions the Court for an order allowing an appeal to the Circuit Court of Appeals of the United States for the Seventh Circuit under the laws of the United States in such cases made and provided for the reasons specified in the assignment of errors filed herewith.

Wherefore your petitioner prays that a citation issue to A. B. Leach & Co., Inc., petitioner in the above entitled cause, and its Attorneys of record, that an appeal, on behalf of United States of America, respondent in the above entitled cause, to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, in said circuit for the correction of the errors complained of and herewith assigned, be allowed, without bond as provided by law, and that an order be entered suspending all further proceedings herein until the determination of said appeal by such Circuit Court of Appeals.

Dated this 6 day of December, A. D. 1935.

M. L. IGOE,
United States Attorney.

17 In United States District Court

Assignment of errors

Filed Dec. 6, 1935

Now comes the United States of America, respondent in error in the above entitled cause, by its Attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, Eastern Division, and in connection with its petition for appeal in this cause assigns the following errors which respondent in error avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record:

I

The Court erred in refusing and failing to enter its order sustaining respondent's demurrer to petitioner's declaration and dismissing such declaration at petitioner's costs on the ground that "petitioner's

declaration fails to allege facts sufficient to constitute a cause of action against respondent", in that the facts alleged in petitioner's declaration, if admitted, are not sufficient to constitute a cause of action against respondent, or sustain a conclusion entitling petitioner to a recovery in accordance with the prayer of its petition, or a judgment in any sum against respondent.

II

The Court erred in entering its order, if any, overruling respondent's demurrer to petitioner's declaration on the ground "that petitioner's declaration fails to allege facts sufficient to constitute a cause of action against respondent", in that the facts alleged in petitioner's declaration are not sufficient to sustain a conclusion of law entitling petitioner to a recovery in accordance with the prayer of its petition, or the judgment entered in favor of petitioner and against respondent on November 22, 1935.

III

The Court erred in entering judgment against respondent and in favor of the petitioner in the sum of $16,526.40 and interest
18 as therein provided, in that such judgment is not supported or sustained by the facts alleged in petitioner's declaration.

IV

The Court erred in entering judgment against respondent and in favor of the petitioner, in that such judgment is predicated upon an erroneous conclusion "that the petitioner is entitled to a recovery in accordance with the prayer of its petition", and the allegations of fact set forth in petitioner's declaration admittedly show that transfers of legal title to, or rights to receive legal title, shares or certificates of stock, or of interests in property or accumulations, in the corporations mentioned in such declaration, or to rights to subscribe for or to receive such shares or certificates, are involved and were effected by the parties to the transactions described therein, within the purview of Section 800 and Schedule A–3, Title VIII, of the Revenue Act of 1926.

V

The Court erred in entering judgment against respondent and in favor of petitioner, in that such judgment is not supported by any proof of the facts alleged, as required by the provisions of Section 763, Title 28, United States Code.

VI

The Court erred in entering judgment against respondent and in favor of the petitioner, in that such judgment is not supported by any findings of fact and conclusions of law, as required by the provisions of Section 764, Title 28, United States Code.

VII

The Court erred in entering judgment against respondent and in favor of petitioner, in that the conclusion "that petitioner is entitled to a recovery in accordance with the prayer of its petition" is not sufficient to sustain such judgment against respondent.

VIII

The Court erred in entering judgment against respondent and
19 in favor of petitioner, in that the facts alleged in petitioner's declaration are not sufficient to sustain the judgment entered on November 22, 1935, in favor of petitioner and against respondent in any sum.

Wherefore respondent in error prays that the judgment of said Court be reversed and that this cause be remanded to said Court with instructions to enter judgment therein in favor of respondent and against petitioner, dismissing petitioner's declaration at petitioner's costs.

M. L. Igoe.
United States Attorney.

In United States District Court

Order allowing appeal

Entered Dec. 6, 1935

It appearing that the respondent, United States of America, in the above entitled cause has filed in this Court a petition for an appeal from the final judgment entered herein, dated November 22, 1935, together with an assignment of errors and prayer for reversal, it is hereby ordered that an appeal as prayed for in said petition be, and it is hereby, allowed, without bond as provided by law, and that all further proceedings in this Court be stayed until the determination of said appeal.

Dated this 6th day of December, A. D. 1935.

William H. Holly,
United States District Judge.

20 In United States District Court

Praecipe for transcript of record

Filed Dec. 11, 1935

To Henry W. Freeman, Esq.,
Clerk of the U. S. District Court,
Northern District of Illinois:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, under the

appeal heretofore allowed in said cause, and include in said transcript the following:

1. Placita.
2. Petitioner's declaration, filed September 11, 1933.
3. Demurrer of defendant, December 9, 1933.
4. Order entered November 22, 1935—Defendant elects to stand on record, petitioner to recover $16,576.40 and interest, and excepts.
5. Defendant's exceptions of December 3, 1935.
6. Defendant's motion to vacate judgment filed December 5, 1935.
7. Order overruling defendant's motion to vacate, entered December 5, 1935; defendant excepts.
8. Notice of appeal, filed December 6, 1935.
9. Petition of United States for appeal.
10. Assignment of errors.
11. Order allowing defendant's appeal without bond.
12. Citation.
13. Praecipe for record.

Said transcript is to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

M. L. Igoe,
MICHAEL L. IGOE,
United States Attorney.

21 [Clerk's Certificate to foregoing transcript omitted in printing.]

[Citation in usual form showing service on A. B. Leach & Co., filed Dec. 6, 1935, omitted in printing.]

22 A. B. Leach & Co., Inc. is petitioner and appellee, to show cause if any there be, why the judgment entered against appellant on November 22, 1935, by said United States District Court, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Holly, Presiding Judge of the United States District Court for the Northern District of Illinois, Eastern Division, this 6th day of December, A. D. 1935.

WILLIAM H. HOLLY,
United States District Judge.

Attest:

Clerk.

Accepted Service Due and Legal Service of the above and foregoing citation on appeal of the above entitled cause is hereby accepted and acknowledged this 6th day of December, A. D. 1935.

A. B. LEACH & CO., INC.
By E. J. BLAIR,
V. J. HEFFERNAN,
GEO. K. BOWDEN,
Its Attorneys of Record.

(Endorsed:) In the District Court of the United States. (Caption.) Citation Michael L. Igoe, United States Attorney. Filed Dec. 6, 1935. Henry W. Freeman, Clerk.

23 [Caption omitted.]

In United States Circuit Court of Appeals

5706

THE UNITED STATES OF AMERICA

vs.

A. B. LEACH & COMPANY

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Minute entry

May 21, 1936

Now this day come the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral arguments by Mr. E. F. McMahon, counsel for appellant, and by Mr. Vincent J. Heffernan, counsel for appellee, and the court having heard the same takes this matter under advisement.

24 In United States Circuit Court of Appeals for the Seventh Circuit

No. 5706. October term, 1935, April session, 1936

UNITED STATES OF AMERICA, APPELLANT

vs.

A. B. LEACH & CO., INC., APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Opinion

(Filed June 30, 1936)

Before EVANS and SPARKS, Circuit Judges, and LINDLEY, District Judge.

SPARKS, Circuit Judge: The Government appeals from a judgment in favor of a taxpayer ordering a refund to the latter of certain taxes held by the District Court to have been wrongly assessed and

collected under section 800, Schedule A3 of the Revenue Act of 1926, pertaining to stamp taxes.

The facts are disclosed only by the declaration to which the Government demurred, and upon which judgment was entered when it declined to plead over. The taxpayer is a firm of investment brokers. In connection with its business it organized various corporations, subscribing for the entire issue of their capital stock for the purpose of selling it to the public. Instead of having the stock issued in the firm name it caused it to be issued in the name of an employee, one Vercouter, for convenience in contemplated sales to the public. The original issue of the stock by the new corporations was duly taxed under the provisions of section 800, Schedule A2. The Commissioner then assessed an additional tax on the alleged transfer from the incorporator to its nominee, which tax the taxpayer paid under protest and then sought to recover by this action.

25 The Government first argues that the judgment entered in this case should be reversed for failure of the court to render specific findings of fact and conclusions of law, and a written opinion, in accordance with the requirements of section 7 of the Tucker Act, 28 U. S. C. A., section 764, pertaining to suits against the United States. While it would undoubtedly have been better practice to file a written opinion setting forth the findings of fact and conclusions of law, in view of the requirements of the statute, we think the failure of the court to do so under the circumstances of this case does not constitute reversible error. The Government demurred to the declaration, thereby admitting all the pleaded facts, and leaving only the issue of law to be determined. As indicated by the order entered in the cause this issue of law was developed by oral argument and briefs filed by both parties, and the merits of the claim were thereby established to the satisfaction of the trial court. He thereupon filed a brief memorandum setting out the cases, on the authority of which he concluded that the taxpayer was entitled to recover. We think that the judgment based thereon is not subject to reversal because this memorandum was not accompanied by findings of facts as to which there was absolutely no argument. The cases upon which the Government relies as authority for a contrary ruling all involved disputed issues of fact. In Dooley Lumber Co. v. United States, 63 F. (2d) 384, the Court of Appeals examined the evidence, setting much of it out in its opinion, and, upon finding that it supported the findings of fact, and that those findings supported the judgment, refused to reverse a judgment against a taxpayer. In United States v. Phillips, 24 F. (2d) 195, the Circuit Court of Appeals held that, although facts recited in the opinion of the District Court were sufficient to support its judgment on the interpretation of the Revenue Act on which it was based, when that interpretation was found erroneous by the Supreme Court in a related case, there were not sufficient facts found to enable the court to render judgment in the light of the decision of that related case,

hence the case was remanded for retrial. In United States v. Tisdale, 114 Feb. 883, the Court of Appeals stated that the findings of fact were not sufficient, even by reference to the bill of particulars, to enable the court to determine whether or not any liability accrued to the Government therefrom. In United States v. Kelly, 89
26 Fed. 946, the Court of Appeals stated that the findings entered by the District Court did not meet the requirements of the statute in that the only specific facts found related to items as to which it rejected the claim, while the facts upon which judgment was rendered were not stated at all by the court. The case had been referred to a master for taking evidence, and it appears that there were many disputed items. We think that none of these cases is authority for the reversal of the judgment under the facts here presented.

With respect to the question of law presented, the Government contends that the issue of the stock to the nominee of the taxpayer constitutes a ransfer of legal title to, or its rights to subscribe for, or to receive legal title to the certificates of stock, taxable under section 800, Schedule A 3.[1] Appellee contends, on the other hand, that there was no transfer at all, that the taxpayer retained all beneficial interest in the stock, subject to its ultimate sale to the public, and merely used its employee's name for greater convenience in effecting that ultimate sale.

We agree with appellee in its contention. We see no material distinction between the situation where a taxpayer takes title to stock in its own name and where it uses the name of an agent. Certainly this does not present the shortcut in transfer of interest held taxable in the case of Raybestos-Manhattan Co. v. United States, 296 U. S. 60. Here there is no such shortcut, for there is no transfer, either of legal title or of beneficial interest. We do not consider that the transaction whereby a principal uses the name of an agent in acquiring title to a property which it was entitled to acquire in its own name results in a transfer of the title to that property to that agent. By such a transaction the taxpayer relinquishes nothing and its agent receives nothing. The only transfer which has taken place here is from the newly organized corporation to the taxpayer in the name of the agent or nominee of the latter. The conclusion here reached is in accord with the decision of Union Trust Co. v. Heiner,
27 26 F. (2d) 391 (D. C. W. D. Pa.), with which we agree. Cf. United States v. Uhlmann Grain Co., decided by this court June 18, 1936.

Judgment affirmed.

---

[1] "Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property * * * or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not * * *."

28 In United States Circuit Court of Appeals

5706

THE UNITED STATES OF AMERICA

vs.

A. B. LEACH & COMPANY, INC.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Judgment

(June 30, 1936)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Recital as to issuance of mandate

And afterwards, to-wit: On the twenty-fourth day of July 1936, the mandate of this court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

29 [Omitted.]

30 In United States Circuit Court of Appeals for the Seventh Circuit

[Title omitted.]

Appellant's motion to recall and stay the issuance of mandate

Filed Aug. 4, 1936

Now comes the United States of America, the appellant in the above-entitled cause, by Michael L. Igoe, United States Attorney, and shows to this Court that

On the 30th day of June 1936, this Court handed down its opinion in this cause affirming the decision of the United States District Court for the Northern District of Illinois;

That on the 24th day of July 1936, the mandate in this cause was issued and forwarded to the Clerk of the District Court of the United States for the Northern District of Illinois;

That the Solicitor General of the United States of America has yet under consideration the matter of the filing of petition for certiorari in this cause;

That the Attorney General of the United States of America has authorized and requested that the mandate heretofore issued in this cause be recalled, and that said mandate be stayed pending the determination of the matter of filing petition for certiorari.

Wherefore, appellant prays that the mandate of this Court heretofore issued on the 24th day of July 1936, be recalled, and that
31 said mandate be stayed and withheld until the 15th day of September 1936.

Dated this 4th day of August A. D. 1936.

M. L. Igoe,
M. L. Igoe,
United States Attorney,
Attorney for Appellant.

32 In United States Circuit Court of Appeals

[Title omitted.]

Order recalling and staying mandate

Aug. 5, 1936

On motion of counsel for the United States of America, appellant in the above entitled cause, and by agreement and consent of counsel for appellee as indicated by the signatures appearing below,

It is now here ordered that the mandate of this court heretofore issued on the 24th day of July 1936, in this cause, be, and the same is hereby, recalled.

It is now here further ordered that the mandate of this court in the above entitled cause be, and the same is hereby, stayed until the 15th day of September 1936.

33, 34 [Clerk's Certificates to foregoing transcript omitted in printing.]

35 Supreme Court of the United States

Order allowing certiorari

Filed October 19, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 40,871. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 331. The United States of America, petitioner, vs. A. B. Leach & Co., Inc. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1936. Term No. 331 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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90624—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 331

UNITED STATES OF AMERICA, PETITIONER

v.

A. B. LEACH & CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on June 30, 1936, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 8) and the opinion of the Circuit Court of Appeals (R. 24) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1936 (R. 26). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent subscribed for shares in several corporations, which were then issued in the name of an employe of respondent, appointed to receive and hold the shares for the benefit of respondent and for its convenience in connection with future sales of said shares to the public. Did this transaction involve a transfer by respondent to its nominee of the right to receive shares of stock, within the stamp tax provisions of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*, pp. 6–8.

STATEMENT

The facts, as set forth in the taxpayer's declaration (R. 2–7), may be summarized as follows:

Respondent is a corporation organized under the laws of New York and during the period in question was engaged in the sale of securities to the public (R. 2–3). Prior to August and September 1931, respondent organized five corporations and subscribed to the original issue of stock thereof, aggregating 826,320 shares (R. 3–5). Immediately upon the organization of said corporations the stock so subscribed for was issued in the name of

one Vercouter, an employe of respondent, appointed to receive and hold the capital stock of said corporations for the sole benefit of respondent and for its convenience in connection with future sales and transfers of said stock to the public (R. 5–6).

In August and September 1931, the Commissioner assessed stamp taxes on respondent under Schedule A (3), Section 800, Title VIII, of the Revenue Act of 1926, in the aggregate amount of $16,526.40, in respect of the foregoing transactions declared by the Commissioner to be transfers by respondent to Vercouter of the right to receive shares of stock. The amount assessed was paid under protest, and on October 8, 1932, respondent filed claim for refund which was denied on March 18, 1933 (R. 6).

This suit was brought on September 11, 1933, to recover the above amount, $16,526.40, with interest. The United States demurred to the petition. The District Court rendered judgment for the taxpayer (R. 9) which was affirmed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the transactions involved constituted transfers by respondent to its nominee of the right to receive shares of stock within the stamp tax provisions of the Revenue Act of 1926.

2. In holding that the transactions involved were not subject to the stamp tax provisions of the Revenue Act of 1926.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. Like the decision of the Court of Claims in *United States* v. *Automatic Washer Co.*, No. 330, present Term, in which the Government has petitioned for certiorari, the decision below is in conflict with that of the Circuit Court of Appeals for the Second Circuit in *Founders General Corporation* v. *Hoey*, decided July 6, 1936, not officially reported, but found in 1936 Prentice-Hall, Vol. 1, par. 1378. The facts in the *Founders General* case closely parallel those in the present case. In each the taxpayer corporation subscribed for shares of stock and designated a nominee in whose name the shares were to be issued. In neither case did the nominee have a beneficial interest in the shares.[1] The court below, in holding the transaction not subject to the stamp tax, relied upon the reasoning and authority of *Union Trust Co.* v. *Heiner*, 26 F.

[1] In the *Founders General* case the nominee was designated prior to the payment by the corporation of the subscription price of the stock; this fact did not affect the conclusion that the corporation transferred to its nominee the right to receive the shares. In the present case it does not clearly appear whether the nominee was designated prior or subsequent to the payment by the corporation of the subscription price for the several blocks of shares (R. 5–6).

(2d) 391 (W. D. Pa.), and the decisions of other District Courts which followed it. As is pointed out in the Government's petition in the *Automatic Washer* case, No. 330, *supra,* the Circuit Court of Appeals for the Second Circuit in the *Founders General* case expressly disapproved and declined to follow the *Union Trust Co.* decision.

The reasons advanced in the petition for certiorari in the *Automatic Washer* case, No. 330, *supra,* are applicable to the present case. They will not be repeated here, but reference thereto is respectfully made.

Because of the importance of the question and the conflict of decisions existing in the lower courts, the application of the stamp tax provisions to transfers involving nominees without beneficial interest should be authoritatively settled by this Court.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII.—STAMP TAXES

SEC. 800.—On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, * * * the several taxes specified in such schedule. * * * (U. S. C., Title 26, Secs. 900, 908.)

* * * * * *

SCHEDULE A.—STAMP TAXES

* * * * *

2. *Capital stock, issue.*—On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents: *Provided,* That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent on each $20 of actual value or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

3. *Capital stock, sales or transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: * * *

Treasury Regulations 71, approved July 7, 1928, promulgated under the Revenue Act of 1926:

ART. 31. *Basis of tax.*—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to shares, or certificates of stock, or of profits, or of interest in property or accumulations in any corporation, joint-stock company, or association, or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

ART. 34. *Sales and transfers subject to tax.*—The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

* * * * *

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

* * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

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114737—36——1

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 331

UNITED STATES OF AMERICA, PETITIONER

v.

A. B. LEACH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 5) is not officially reported. The opinion of the Circuit Court of Appeals (R. 15–17) is reported in 84 F. (2d) 908.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1936 (R. 18). The petition for a writ of certiorari was filed September 1, 1936, and was granted October 19, 1936. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent subscribed for the original shares in several corporations it organized. The shares were then issued in the name of an employee of respondent, appointed to receive and hold them for respondent's benefit and convenience in connection with future sales thereof to the public. Did this transaction involve a taxable transfer by respondent, within the purview of Section 800, Schedule A–3 of the Revenue Act of 1926?

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 15–18.

STATEMENT

This action was brought by respondent on September 11, 1933, for the recovery of $16,526.40 paid as documentary stamp taxes. (R. 1–5). Petitioner filed a general demurrer to respondent's declaration and the District Court on July 16, 1935, entered its memorandum opinion wherein it concluded that respondent should recover (R. 5). Petitioner elected to stand on its demurrer and, accordingly, on November 22, 1935, the court entered judgment in favor of respondent and against petitioner for $16,526.40, with interest, and allowed petitioner an exception (R. 6). On December 3, 1935, petitioner filed written exceptions to the order of judgment and refusal and failure of the court to sustain petitioner's demurrer (R. 6–8)

and, on December 5, 1935, moved to vacate the judgment (R. 8–9), which motion was overruled forthwith and an exception allowed (R. 14). On appeal the Circuit Court of Appeals affirmed the judgment (R. 17, 18).

The facts, as set forth in respondent's declaration (R. 1–5), may be summarized as follows:

Respondent is a corporation organized under the laws of New York and, from July, 1917, to April, 1932, was engaged in the sale of securities to the public (R. 1). Prior to September, 1931, but subsequent to enactment of the Revenue Act of 1926, respondent organized five corporations and subscribed for all of their original issue stock, aggregating 826,320 shares (R. 1–3). Immediately upon completion of the organization of the corporations, the stock so subscribed for was issued in the name of one Vercouter, an employee of respondent appointed to receive and hold the capital stock of the corporations for respondent's benefit and convenience in connection with future sales and transfers of the stock to the public (R. 3–4). The original issue tax of five cents on each share was paid as required under Schedule A–2, Title VIII of the Revenue Act of 1926, and is not in dispute.

In August and September, 1931, the Commissioner of Internal Revenue assessed transfer taxes against respondent in the aggregate sum of $16,526.40, under Schedule A–3 of said Act, in respect of the foregoing transactions (R. 1–3), upon the

transfer by respondent of its right to receive said stock.

The assessments were paid and, on October 8, 1932 (R. 4), respondent filed claims for refund which were denied by the Commissioner on March 18, 1933, on the ground that respondent (R. 4–5)—

> * * * subscribed for the stock involved and directed that it be issued in the name of its nominee; that the nominee therefore received the legal title to the stock which petitioner [respondent] had the right to receive and such transfer of the right to receive is subject to the tax, * * *.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the transactions involved constituted transfers by respondent to its nominee of the right to receive shares of stock within the stamp tax provisions of the Revenue Act of 1926.

2. In holding that the transactions involved were not subject to the transfer stamp tax provisions of the Revenue Act of 1926.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

Respondent, as sole subscriber to the shares of five newly organized corporations, had the right to receive those shares and the right to command their disposition. Respondent's direction to the issuing

corporations that the stock and certificates be issued in the name of its employee, Vercouter, called the statute into operation. The subsequent act of issuance effectively completed the transfer of respondent's right to receive the shares. The decision of the court below holding that no taxable transfer was effected is inconsistent with the decision of this Court in *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60. The fact that in that case a beneficial interest was transferred, whereas here the transferee secured no beneficial interest, is immaterial under the statute and regulations. This was pointed out by the Circuit Court of Appeals for the Second Circuit in *Founders General Corporation* v. *Hoey*, 84 F. (2d) 976, pending on writ of certiorari, No. 398.

Amendments to the Act of 1926 reinforce the conclusion that nominee transactions fall within the scope of the stamp tax provisions. The Revenue Act of 1932 exempted certain transfers or deliveries by a fiduciary to a nominee, or by one nominee of a fiduciary to another. An amendment enacted on June 29, 1936, exempts certain transfers or deliveries by or to nominees of brokers. These specific exceptions are not applicable in the present case, since respondent acted neither as fiduciary nor as broker, and since the 1926 Act applies. But their enactment demonstrates that nominee transactions of the type here involved are intended to be covered by the general provisions of the statute.

ARGUMENT

Section 800, Schedule A–2 of the Revenue Act of 1926, *infra*, imposes a stamp tax at a specified rate on the original issue of shares of corporate stock. By Section 800, Schedule A–3, *infra*, a like tax is laid—

> On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock * * *, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, * * *, or by any paper or agreement or memorandum or other evidence of transfer or sale, *whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not,* * * *. [Italics supplied.]

Section 800 imposes liability for the tax upon the transferor, the transferee or the corporation whose stock is transferred. *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60.

Respondent corporation was engaged in the business of selling securities to the public. It organized five corporations for all of whose original issues of stock it subscribed. Immediately on the completion of the organization of said corporations, the stock so subscribed for was issued, pursuant to respondent's direction, in the name of its agent and employee, one Vercouter, "appointed to receive and hold" the stock for respondent's benefit

and convenience in connection with contemplated sales and transfers to the public. (R. 3–4).

Respondent contends that its subscriptions to the stock and the issuance thereof in the name of Vercouter, pursuant to its direction, constituted a single transaction, taxable only under Schedule A–2 relating to the original issue, and that Schedule A–3 has no application. This contention, we submit, overlooks the essential character of the transaction and unduly restricts the scope of the taxing Act.

The respondent, as sole subscriber to the shares of the newly formed corporations had the right to receive the shares for which it subscribed. Respondent necessarily had the right to command the disposition of the shares, including the right to direct the issuance of the stock to another. Respondent's direction to the corporations to issue the stock and certificates in the name of Vercouter called the statute into operation. If the nomination of Vercouter is insufficient, of itself, to effect a taxable transfer of respondent's right to receive, the subsequent act of issuance effectively completed the transfer of that right and clearly brought the taxing statute into operation.

The transaction was not merely one of form. There was a transfer in substance as well. Upon issuance of the stock certificates in the name of Vercouter, legal title to the stock was vested in him and he doubtless appeared on the books of the issu-

ing corporations as a stockholder. Consequently, respondent could not thereafter have caused the transfer of the stock to purchasers, nor could respondent have transferred the certificates therefor, without appropriate endorsement by Vercouter.

Respondent's right to receive the stock and legal title thereto was as effectively transferred by the method followed as if the stock had first been issued to respondent as subscriber and then endorsed and surrendered with directions to reissue in the name of Vercouter. The fact that respondent could perhaps have withdrawn its direction to the issuing corporation becomes unimportant upon actual issuance of the stock pursuant to the direction given by respondent and not withdrawn.

When thus viewed, we submit, the transaction involved a taxable transfer by respondent within the scope of the statute as described by this Court in *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, 62.

> The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another. See *Provost* v. *United States,* 269 U. S. 443, 458, 459. While the statute speaks of transfers, it does not require that the transfer shall be directly from the hand of the transferor to that of the transferee. It is

> enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another.

It may be true that as between respondent and Vercouter the latter had no beneficial interest in the shares. Such an interest, however, is not requisite to liability for the tax. The statute taxes a transfer even though the holder is not entitled "in any manner to the benefit of such stock, interest, or rights". (*Infra*, p. 16.) Treasury Regulations 71, Article 34 (u) similarly provide that "Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock". (*Infra*, p. 18.)

The court below apparently gave controlling weight to the fact that what was transferred by respondent was not a beneficial interest such as was involved in the *Raybestos-Manhattan* case, *supra*. (R. 17.) In so deciding the court followed a decision of a District Court in *Union Trust Company* v. *Heiner*, 26 F. (2d) 391 (W. D. Pa.), which in turn has been followed in several other cases in the Seventh Circuit and elsewhere.[1] The reasoning of the court in the *Union Trust Company* case was

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[1] *Field, Glore & Co.* v. *United States* (N. D. Ill.), decided April 8, 1935, not officially reported but found in Vol. I, Prentice-Hall, 1935, par. 1196; *id.*, par. 1197; *Lawrence Stern & Co.* v. *United States* (N. D. Ill), decided July 17, 1935, not officially reported but found in Vol. I, Prentice-Hall, 1935, par. 1947. See also *White* v. *Consolidated Equities*, 78 F. (2d) 435 (C. C. A. 1st), and *Dean* v. *Caldwell & Co.*, 9 F. Supp. 177 (M. D. Tenn.).

expressly rejected by the Circuit Court of Appeals for the Second Circuit in *Founders General Corporation* v. *Hoey*, 84 F. (2d) 976, now pending on writ of certiorari, No. 398. In that case Judge A. N. Hand said (p. 978):

> It is plain that the court in *Union Trust Company* v. *Heiner* ignored the express provision that the absence of any beneficial interest on the part of the holder should not exempt the transfer from taxation. The decision, therefore, proceeded on an indefensible theory. That decision has since been followed by various district courts, but we cannot avoid the conclusion that it is contrary to the plain meaning of the statute.

The decision of the court below has the effect of enlarging the class of exemptions prescribed by the statute. Schedule A-3 of the 1926 Act exempts transfers of the following kinds: Transfers of stock as collateral security for money loaned; transfers to a broker for sale; and transfers from a broker to a customer upon whose order he has made the purchase. The specific exemption of these classes of transfers strongly indicates that Congress intended to exclude all other kinds of transfers from the exempted class. *Cf. George A. Hormel & Co.* v. *United States*, 10 F. Supp. 623, 625 (D. Minn.); *Founders General Corp.* v. *Hoey*, *supra*, at 979.

Amendments subsequent to the 1926 Act confirm the conclusion set forth above. Section 723 of the

Revenue Act of 1932, c. 209, 47 Stat. 273, added the following proviso:

> Provided further, That the tax shall not be imposed upon deliveries or transfers from a fiduciary to a nominee of such fiduciary, or from one nominee of such fiduciary to another, if such shares or certificates continue to be held by such nominee for the same purpose for which they would be held if retained by such fiduciary, or from the nominee to such fiduciary, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts:

It will be observed that this proviso granted an exemption in the case of certain nominee transactions, but that the exemption was strictly limited to transfers from a fiduciary to his nominee or from one nominee of a fiduciary to another, and it was required that a certificate setting forth the facts accompany the delivery or transfer. The inference is plain that had Congress intended to exempt nominee transactions generally a different provision would have been employed. It is equally clear that, in the absence of such a specific exemption, nominee transactions were intended to be included in the general class of taxable transfers. *Cf. Gooch* v. *United States,* 297 U. S. 124, 129.

Again, in 1936, a significant amendment was adopted. Act of June 29, 1936, c. 865, 49 Stat. 2029. Previously, deliveries or transfers to a broker for sale, or by a broker to a customer

upon whose order securities were purchased, were exempted from tax. The 1936 amendment extended that exemption to include transfers to or by a registered nominee of a broker. The amended provision follows, with the new material indicated by italics:

> *Provided further,* That the tax shall not be imposed upon deliveries or transfers to a broker *or his registered nominee* for sale, nor upon deliveries or transfers by a broker *or his registered nominee* to a customer for whom and upon whose order [he] *the broker* has purchased same, *nor upon deliveries or transfers by a purchasing broker to his registered nominee if the shares or certificates so delivered or transferred are to be held by such nominee for the same purpose as if held by the broker,* but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: * * *

The respondent suggests (Brief in Opposition, p. 6) that the 1936 amendment is applicable to the situation involved in the present case. There are two short answers to this suggestion: First, the provision is not retroactive, but applies only to transfers executed subsequently thereto. Treasury Regulations 71, Article 35, have been specifically amended to conform to the 1936 statutory change; and the amendment is expressly limited to deliveries or transfers occurring on or after June 29, 1936. See Cum. Bul. XV–43 p. 15. Second, the

new provision applies only to brokerage transactions. The facts in the instant case indicate that respondent was engaged as a dealer in securities purchasing for its own account and not as a broker purchasing for the account of a customer.

While the 1936 amendment does not apply to the instant case, its enactment, like that of the 1932 amendment, is of significance. Congress has exempted a somewhat larger class of nominee transactions than previously, but has not deemed it advisable to exempt nominee transactions generally. In adopting the 1936 amendment, Congress acted upon the assurance that the desired result could not be achieved by a change in the Treasury Regulations.[2] The contentions of respondent are thus seen to be an effort to read into the stamp tax provisions an exception which Congress has not seen fit to make.

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[2] The Report of the House Committee on Ways and Means indicates that the amendment was proposed in order to place corporate brokers upon an equality with unincorporated brokers, since the former have felt compelled to take delivery of shares in the name of an individual. The Report states: "This committee believes that such discrimination is unjust and inequitable, and is assured that such discrimination cannot be removed by a change in Treasury Department regulations, but that the enactment of this bill is necessary to overcome the inequality." House Report 3023, 74th Cong., 2d Sess., p. 2.

CONCLUSION

For the reasons stated the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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DECEMBER 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101:

TITLE VIII. STAMP TAXES

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title * * *. (U. S. C., Title 26, Sec. 900.)

SCHEDULE A. STAMP TAXES

* * * * *

2. Capital stock, issue: On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents: *Provided,* That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent on each $20 of actual value, or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided,* That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further,* That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further,* That in case of sale where the evidence of transfer is shown only by the books of the corporation the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate

the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. Any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale, or who in pursuance of any such sale delivers any certificate or evidence of the sale of any stock, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both. (U. S. C., Title 26, Sec. 902.)

Treasury Regulations 71, approved July 7, 1928, promulgated under the Revenue Act of 1926:

ART. 31. *Basis of tax.*—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to shares, or certificates of stock, or of profits, or of interest in property or accumulations in any corporation, joint-stock company, or association, or of the right to subscribe for or

to receive such shares or certificates, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

ART. 34. *Sales and transfers subject to tax.*—The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

* * * * *

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

* * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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No. 331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

UNITED STATES OF AMERICA,
Petitioner,

vs.

A. B. LEACH & CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

Opinions Below.

This cause originated in a judgment for the Respondent, Plaintiff below, entered in the District Court for the Northern District of Illinois, Eastern Division, on November 22, 1935. The opinion of the District Court, not appearing in the Federal Reporter, is set out in the record, (R. 5).

The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Seventh Circuit, 84 F. (2d) 908 (R. 15-17).

Jurisdiction.

Pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, this court granted its writ of certiorari.

The Issue Presented.

Where an investment banker purchases shares of stock and causes certificates to be issued to it in the name of an employee, does the mere nomination of such employee as its dummy in the transaction subject the banker to a stock transfer tax under Schedule A (3) of Section 800 of the Revenue Act of 1926?

Statutes Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII—STAMP TAXES.

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid for and in respect of the several bonds, debentures, or *certificates of stock* and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title * * * by any person who makes, signs, issues, sells, removes, consigns, or ships the same * * * the several taxes specified in such schedule. * * *

SCHEDULE A—STAMP TAXES.

2. Capital stock, issue: On each original issue, whether on organization or reorganization, of certificates of stock, * * * by any corporation, on each $100 of the face value or fraction thereof, 5 cents: * * *

3. Capital stock, *sales and transfers*: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers *of legal title to shares or certificates of stock* or of profits or of interest in property or accumulations of any corporation, *or to rights to subscribe for or to receive such shares or certificates*, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: * * * (Italics supplied.)

Statement.

During the years immediately prior to 1931, Respondent was an incorporated investment banker engaged in buying new issues of stock from issuing corporations and selling such stock to the public, (R. 1). For its convenience in marketing the stock so purchased it took delivery of the certificates evidencing the shares in the name of a dummy, George I. Vercouter, an employee, (R. 4).

During the years in question Respondent purchased 826,320 shares of original stock from various corporations. The issuance tax imposed by Paragraph 2 of Schedule A of Section 800 of the Revenue Act of 1926 was duly paid upon the issuance of these shares of stock, (R. 3).

In August and September of 1931 the Commissioner of Internal Revenue assessed against the Respondent $16,526.40 under the provisions of Schedule A (3) of Section 800 of the Revenue Act of 1926. This tax was assessed on the theory that the Respondent had transferred to George I. Vercouter, its dummy, the right to receive the shares of stock issued in his name, (R. 1-3).

Suit was instituted for a refund, resulting in a judgment for the Plaintiff which was affirmed upon appeal. This proceeding followed.

SUMMARY OF ARGUMENT.

I.

Acceptance by a Subscriber of Certificates of Stock Issued in the Name of a Dummy Does Not Involve a Transfer by the Subscriber to the Dummy of the Right to Receive the Shares of Stock.

II.

The Judicial Decisions Have Held with Peculiar Uniformity That the Issuance of Stock to a Subscriber in the Name of Its Nominee Does Not Involve a Transfer from the Subscriber to the Nominee of the Right to Receive the Stock.

III.

Amendments to Section 800 of the Revenue Act of 1926 Do Not Lend Support to the Contention That Congress Intended to Include in the Statute as a Taxable Transfer the Issuance of Original Stock in the Name of a Nominee of the Subscriber.

ARGUMENT.

I.

Acceptance by a Subscriber of Certificates of Stock Issued in the Name of a Dummy Does Not Involve a Transfer by the Subscriber to the Dummy of the Right to Receive the Shares of Stock.

In years immediately prior to 1931 there were delivered to the Respondent, as a subscriber for stock, certificates of original shares of corporate stock issued in the name of George I. Vercouter, the nominee or dummy of the Respondent. Subdivision (2) of Schedule A, Title VIII, of the Revenue Act of 1926 imposes a tax upon the issuance of original stock. Respondent has paid this issuance tax. Its liability for this tax is not here in dispute.

In addition to the *issuance* tax on the transaction Respondent has been subjected to a *transfer* tax imposed under the provisions of Subdivision (3) Schedule A, Title VIII of the Revenue Act of 1926. This subdivision imposes an excise

> "On all sales, * * * or deliveries of, or transfers of legal title to shares or certificates of stock * * *, or to rights to subscribe for or to receive such shares or certificates, * * * whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not * * *."

The original issuance of the stock was in the name of Vercouter, Respondent's nominee. There is not, then, involved here the question of whether there was a transfer to Vercouter of *legal title* to shares of stock. The only question presented here is, was there *transferred* to Vercouter by Respondent the right to receive the stock? Petitioner

contents that Respondent transferred this right to its nominee. This contention Respondent protests.

Respondent contends that its nominee, Vercouter, had no *rights* to receive the stock. At no time prior to the issuance of the stock in his name could Vercouter by any action at law or in equity compel the issuance of the stock to him. At any time prior to the issuance of the stock in the name of Vercouter, Respondent could by appropriate action enforce its rights to have the stock issued in its own name. Upon the issuance of the stock the right to receive it ended.

If Respondent's nominee could not enforce by appropriate legal action the issuance of the stock to himself he was not the transferee of rights to receive the stock. Hohfeld in *Fundamental Legal Conceptions,* pages 36-38, discusses at length the meaning of the term "rights". He quotes with approval the definition of "right" by Justice Stayton in *Mellinger* v. *City of Houston* (1887), 68 Tex. 45, 3 S. W. 249, 253:

> "A right has been well defined to be a well-founded claim, and a well-founded claim means nothing more or less than a claim recognized or secured by law. * * * it must necessarily be held that a right in a legal sense exists when in consequence of the existence of given facts, the law declares that one person is entitled to enforce against another, a given claim, or to resist the enforcement of a claim urged by another."

Unless Respondent's nominee had a legally enforcible claim to receive the stock he did not have "rights". Clearly, Vercouter, did not possess "rights" to receive the stock.

To give "right" a definite and appropriate meaning it is of benefit to determine the correlative of right, that is, duty. In *Lake Shore & M. S. R. Co.* v. *Kurtz,* 10 Ind. App. 60, 37 N. E. 303, 304, it is stated:

> "A duty or a legal obligation is that which one

> ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated."

If Respondent's nominee had a "right" to receive the stock, there existed as a correlative in the Respondent a duty owed Vercouter, to permit him to receive the stock. Clearly Respondent owed no such duty to its nominee in respect of the receipt of the stock.

The transaction under discussion is taxable under Subdivision (3) only if Respondent *transferred* to its nominee the right to receive the stock. Was there such a transfer? Any right that existed in respect of the stock was a contractual right arising out of the subscription contract entered into by Respondent. The transfer of such a right would be the transfer of a chose in action. Beale in *A Treatise on the Conflicts of Laws,* Volume I, page 79, states:

> "Choses in action, including contract rights and debts, are by their very nature incapable of transfer; for they are two party relations, and the personalities of the parties are fundamental qualities of the relation. A new party could be inserted only by such a complete change in the nature of the obligation as would be a destruction of it and the creation of a new one; and this can be done only by mutual consent of both parties. Such a right then is incapable of transfer; it can only be assigned. An assignment is merely a contract that the assignee enjoy all the benefits of it, including that of suing. It does not put the assignee into the position of the assignor, or affect his rights except collaterally."

Probably the Respondent could not have transferred to anyone its rights under the subscription contract. It could have assigned its rights. For purposes of this argument, the word "transfer" as used in the statute shall be treated as synonymous with the word "assignment". Respondent's nominee, Vercouter, was not the transferee or the

assignee of the subscription rights belonging to the Respondent. Such rights could have been assigned to Vercouter only by contract. In a contract there must be two parties. Vercouter, as the nominee of the Respondent, could not have been the second party to the contract. He was the mere nominee of the Respondent. The action, not the "transaction", of Respondent in appointing its employee a nominee or agent was not the assigning to a second party to a contract of subscription rights held by Respondent. When a principal acts through an agent, he does not transfer or assign to the agent property or rights to property or choses in action.

Whatever rights to receive the stock subscribed for by the Respondent, remained the rights of the Respondent. They did not become the rights of its nominee. No act of the Respondent in the transaction *transferred* any rights to receive the stock to its nominee. The Circuit Court of Appeals for the Seventh Circuit stated the same conclusion as follows (R. 17):

> "We see no material distinction between the situation where a taxpayer takes title to stock in its own name and where it uses the name of an agent. * * * We do not consider that the transaction whereby a principal uses the name of an agent in acquiring property which it was entitled to acquire in its own name results in a transfer of the title to that property to that agent. By such a transaction the taxpayer relinquishes nothing. The only transfer which has taken place here is from the newly organized corporation to the taxpayer in the name of the agent or nominee of the latter."

Respondent was a corporation. It was an incorporated banker. It subscribed for stock to be sold by it to the public. Its business necessitated that the stock issued to it be transferable with the same facility that stock issued in the name of an individual could be transferred. Accordingly, the issuance of the certificate in the name of a

nominee, an individual, was employed. If Petitioner's contention in this case is adopted, an undue hardship is imposed upon an incorporated banker. It is subjected to both an issuance and a transfer tax on a transaction which results in only an issuance tax when entered into by an individual. This hardship does not end with the issuance of the stock, however. Pursuant to Petitioner's contention, when the incorporated banker sells the stock it becomes liable for two more transfer taxes: (1) a tax on the transfer from the nominee back to the banker, and (2) a tax on the transfer from the banker to its purchaser. Thus, four taxes would be collectible on one purchase and one resale. A construction of the taxing statute resulting in such an accumulation of taxes should not be adopted unless the provisions thereof lend themselves to no other interpretation.

The issuance of certificates of corporate stock in the name of a nominee is a common commercial practice. The Regulations promulgated under the provisions of the Revenue Act of 1926 do not provide that this type of transaction is subject to a stock transfer tax. Had Congress intended to tax this transaction as a transfer of the right to receive stock from the subscriber to the nominee, it could have done so simply and clearly.

II.

The Judicial Decisions Have Held with Peculiar Uniformity That the Issuance of Stock to a Subscriber in the Name of Its Nominee Does Not Involve a Transfer from the Subscriber to the Nominee of the Right to Receive the Stock.

The contention advanced by the Government in this proceeding is not new. It has been alternately suggested and abandoned by Bureau officials throughout the past thirty-

five years. With singular uniformity it had been rejected by the courts until the decision in *Founders General Corporation* v. *Hoey,* 12 F. Supp. 290, decided September 10, 1935.

The first recorded decision is *United States* v. *Clawson, et al.* (D. C., E. D. Mo.), 119 F. 994, a case arising under the stamp tax provisions of the Act of March 2, 1901, which imposed a transfer tax with respect to "bucket shop" transactions. One Swartz, *operating in his own name,* acted as the undisclosed agent of the Boyd Commission Company. He sold 25 shares of stock to Loomis, after having procured the approval of the commission company, which would furnish the shares in the event of a call for delivery. He executed a memorandum of sale *in his own name,* affixed the required two cent stamps, delivered the memorandum to Loomis, received the required margin, and accounted in due course to the commission company. The commission company and Clawson, its manager, were indicted for having engaged in a transaction with Swartz for the sale of 25 shares of stock without affixing the required revenue stamps upon a memorandum of sale. The court directed a verdict of not guilty, stating in the course of its opinion:

> "But it is contended that, even if Swartz acted as agent for the commission company in the transaction, he, theoretically, at least, purchased the stock which he was to deliver to Loomis from the commission company, and therefore that the latter company was required by the provisions of the act of Congress in question to make and stamp a memorandum of sale thereof to Swartz. To this contention I cannot give assent. If Swartz was agent of the commission company in the transaction, his act was the act of that company, and not his own. The transaction was the transaction of that company, and not the transaction of Swartz.
>
> * * * * * *
>
> Being perfectly clear in my own mind that *the transaction disclosed by the evidence in this case is a single*

> *transaction, I cannot treat it as involving two,* and as requiring the payment of a tax by the principal, when the agent has already paid all the tax to which the single transaction is subject." (Italics supplied.)

The issue does not appear to have been asserted again for several years. It next arose, however, in *Union Trust Co.* v. *Heiner,* (D. C., W. D. of Pa.) 26 F. (2d) 391, decided February 8, 1928. This case involved the stamp tax provisions of the Revenue Act of 1921, identical in their terms with those of the Revenue Act of 1926. The plaintiff had purchased stock to be delivered to it or its nominee. At its request the certificate was issued in the name of James M. Kommer, an employee of the plaintiff. Kommer had no interest in the stock and merely took title thereto for the convenience of the plaintiff in connection with future sales and transfers of the stock to the public. The stamp tax with respect to the original issue of the stock was paid. The Government exacted a further tax with respect to the instrument nominating Kommer to receive the certificate. Suit was instituted for the refund of this tax. The court stated, page 391:

> "In our opinion, there was but one transaction involved in this issue of stock. There was no transfer of any rights in the stock to Kommer. He was the mere employee and agent of the plaintiff, appointed to receive and hold this capital stock for the sole and exclusive benefit of the plaintiff."

No appeal was taken by the Government in the Heiner case.

Six years later, the same contention was again asserted in *Dean* v. *Caldwell & Co.* (D. C., M. D. Tenn.), 9 F. Supp. 177. There, Caldwell & Co., a large investment house, had purchased certain securities, and, solely for its convenience, had caused them to be taken in the name of E. A. Goodloe, its nominee. Goodloe was an employee.

In rejecting the Government's contention that a tax was due because of an alleged transfer from Caldwell & Co. to Goodloe, the District Court said, page 179:

> "It is conclusively shown that the nominee had no interest in the stock * * * and merely took title to the same for the convenience of his employer, the defendant, in connection with future sales and transfers of stock to the public. * * *"

The Government again abandoned its contention. It took no appeal.

In *Consolidated Equities, Inc.* v. *White,* (D. C., Mass.) 7 F. Supp. 851, affirmed (C. C. A. 1) 78 F. (2d) 435, Plaintiff ordered its broker to purchase voting trust certificates. The broker paid the purchase money to the issuing corporation which caused certificates of stock to be issued to voting trustees, who in turn issued certificates for said stock to the Plaintiff. The Government contended that a transfer tax was due on the transfer of the right to receive legal title to the certificates from Plaintiff to the voting trustees. The court below rejected the Government's contention and was affirmed by the Appellate Court. That court stated, page 436:

> "It is true, as the collector contends, that in matters of this sort, the statute requires that substance rather than form shall be considered, and that 'all transfers of legal title to shares or certificates whether technical sales or not' are taxable. (*Provost* v. *U. S.* 296 U. S. 443, 458, 46 S. Ct. 152, 155, 70 L. Ed. 352; *Goodyear Co.* v. *U. S.* 273 U. S. 100, 47 S. Ct. 263, 71 L. Ed. 558); but *this does not warrant imputing to transactions a character substantially different from what they in fact were in order to make them taxable.*" (Italics supplied.)

In *Field, Glore & Co.* v. *United States,* (D. C., N. D. of Ill.), decided April 8, 1935, (1935 C. C. H. 9290), the plaintiff purchased large blocks of stock. The plaintiff caused the stock certificates to be issued in the names of certain

of its employees, as dummies. Consistent with the view enunciated in an unbroken line of authorities in the district courts, the court again rejected the contention of the Government and held that no transfer tax was due because of an alleged transfer of the right to receive the stock. No appeal was taken by the Government from this decision.

A similar conclusion was reached by the Court of Claims in *Automatic Washer Co.* v. *United States,* 15 F. Supp. 70, a case now before this court on certiorari, Docket No. 330.

In conflict with the judicial decisions cited herein is *Founders General Corporation* v. *Hoey,* 84 F. (2d) 976 (C. C. A. 2), affirming the decision rendered below in favor of the Government, 12 F. Supp. 290.[1] In this case an incorporated investment banker subscribed for stocks and directed that the certificates be issued in the name of Benton & Co. The certificates were issued in the name of Benton & Co. and delivered to the investment banker. Benton & Co. was a partnership employed under contract to act as nominee for the banker. In respect of this contract the court observed:

> "It was so provided that Benton & Co. should have no 'beneficial interest' in securities so held, that it waived all right, title, and interest in any securities held or received by it."

The court observed that the question in issue was "whether the mere nomination of Benton & Co. as dummy in whose name the stock was registered, subjected the Plaintiff to a stock transfer tax under Title VIII, Section 800, of the Revenue Act of 1926."

In reaching its conclusion that there was a taxable transfer, the court stated, page 979:

> "There was a transfer to Benton & Co. of the right to receive the stock."

1. The Court rendered its decision in September, 1935. Some seven months later a different judge in the same court rendered a conflicting opinion, *National Bond & Share Corporation* v. *Hoey,* 14 F. Supp. 787.

Where the court finds that the nominee had no rights to the stock it is difficult to appreciate why the court should hold that there was a transfer to the nominee of the right to receive the stock.

Mr. Justice Hand in his opinion in the Founders General case cites with approval two decisions interpreting Section 270 of the Tax Law of the State of New York, as amended by Laws 1911, c. 352. This section provided for a stock transfer tax. One of the cases, *Bonbright & Co.* v. *New York*, 165 Appellate Division 640, 151 N. Y. Supp. 35, involved the following: In 1912 a partnership caused its assets to be transferred to a corporation in exchange for 100,000 shares of stock issued to the partnership in one certificate. The partnership sold rights to trustee certificates for 28,000 shares. Subsequently it entered into a trust agreement with the Bankers Trust Company, as trustee, and transferred to the Bankers Trust Company the 100,000 shares. Under protest a transfer tax was paid on the full number of shares. Suit was brought to recover the transfer tax paid on the 72,000 shares on the ground that there had been no transfer of the beneficial interest in these shares to the trust company. The court held that there had been a transfer of legal title and that was sufficient for the imposition of the tax.

The other case cited was *Travis* v. *Ann Arbor Co.*, 180 App. Division 799, 168 N. Y. Supp. 53, affirmed 227 N. Y. 640, 126 N. E. 923. Defendant purchased shares of stock and had the certificate issued in the name of a nominee. The nominee left the employ of the defendant and the title to the certificate was transferred from the nominee to a second nominee. The second nominee endorsed the certificate and left it in the custody of the defendant. Two transfer taxes were exacted; one on the transfer from the first nominee to the second nominee and the other on the en-

dorsement in blank of the certificate of stock by the second nominee and its delivery to the defendant. The court affirmed both taxes. This case involved the transfer of record title to issued stock and not the question of the transfer of rights to receive original stock when issued. Neither of the cases involved the question presented in this proceeding.

Petitioner contends in its brief that the decision of the court below is in conflict with the decision in *Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60, 56 S. Ct. 63, 80 L. Ed. 42. That decision is devoted to the disposition of a conflict which had arisen in cases involving a controversy quite distinct, the reorganization cases in which the assets of corporation A are transferred to corporation B in exchange for the capital stock of B issued directly to the stockholders of A. The court held that this issuance by B of its shares of stock directly to the stockholders of A gave rise, under the provisions of Section 800, Title VIII, of the Revenue Act of 1926, to liability for not only an issuance tax, but a transfer tax, based upon the transfer from corporation A to its shareholders of the right to receive the stock issued by corporation B.

The Raybestos-Manhattan decision gave finality to a principle previously asserted and repeatedly reasserted in the lower courts. *Marconi Wireless Telegraph Co.* v. *Duffy* (D. C., N. J.), 273 F. 197; *Consolidated Equities, Inc.* v. *White,* (D. C., Mass.), 9 F. Supp. 145; *United States* v. *Brown Fence & Wire Co.* (D. C., N. D. of Ohio), 9 F. Supp. 1008; *Raybestos-Manhattan, Inc.* v. *United States* (Ct. Cl.), 10 F. Supp. 130; *George A. Hormel & Co.* v. *United States* (D. C., Minn.), 10 F. Supp. 623. It resolved an apparent conflict with the decision of the Third Circuit in *MacLaughlin* v. *Westmoreland Coal Co.* 73 F. (2d) 1004, affirming 8 F. Supp. 963 and certain other reorganization cases. But

it had nothing whatever to do with the principle now so well established in the nominee cases.

The reorganization cases hold that the transfer tax "is laid upon *the substance of the transaction* rather than the form," *Raybestos-Manhattan* v. *United States*, 10 F. Supp. 130. Petitioner would abandon that proposition in its nominee cases. It would reconstruct the form of the transaction, and then levy a tax by reference to the reconstructed form, wholly in disregard of the substance.

In the reorganization case the transferor corporation had a right to receive the shares of stock in the transferee corporation. It could part with that right only with the assent of its stockholders. That assent it procured in exchange for the transfer of that right to the stockholders. After that transfer the stockholders could enforce the right to receive the stock involved. In the reorganization case, in contrast to the nominee case, there was a relinquishment of the right to receive the shares or certificates and the acquisition of that right by another. There was a transfer. Mr. Justice Stone in his opinion states:

> "It is the relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation."

In the reorganization case, by agreement, the transferor corporation transferred or assigned its rights to the stock to its stockholders, a party to the contract. In the nominee case the subscriber makes no assignment to the nominee. The nominee is not a party to any contract. Neither is he a grantee by any conveyance. He is only the subscriber's *alter ego*.

III.

Amendments to Section 800 of the Revenue Act of 1926 Do Not Lend Support to the Contention That Congress Intended to Include in the Statute as a Taxable Transfer the Issuance of Original Stock in the Name of a Nominee of the Subscriber.

Petitioner in its brief, pages 10-13, suggests that amendments to Section 800, Title VIII of the Revenue Act of 1926, support its contention that the issuance of stock to a subscriber in the name of its nominee is a transfer by the subscriber to the nominee of the right to receive the stock. There have been two such amendments. In 1932 Congress expressly exempted from the application of the Act, transfers of legal title to shares or certificates of stock from a fiduciary to his nominee or from such nominee to another, see Section 723 of the Revenue Act of 1932. In 1936 Congress expressly exempted from the application of the Act transfers of stock to a nominee of a broker, Act of June 29, 1936, c. 865, 49 Stats. 2029.

Both of these amendments pertain to transfers of issued stock to certain nominees. They do not pertain to the issuance of original stock in the name of a nominee of a subscriber. They limit the provisions of the statute pertaining to the transfer of legal title to stock already issued. They do not pertain to the provisions of Section 800 of the Revenue Act of 1926, taxing the transfer of "rights to subscribe for or to receive" stock. There would be no inconsistency in the courts holding that under Subdivision (3) of Schedule A, Section 800, of the Revenue Act of 1926, before amendment, that the transfer of recorded title of issued stock from a holder to a nominee would be a taxable transfer of legal title of shares or certificates of stock, and in holding that the issuance of original stock to the nominee

of a subscriber would not involve a taxable transfer to the nominee of right to receive the stock. The amendments pertain to a different taxing provision than the one involved in this appeal.

The amendments made to the Revenue Act of 1926 above referred to do indicate that where the attention of Congress has been called to the likelihood of the Bureau's taxing as a transfer, a transaction which is in form a transfer, but in substance is not, the Congress will amend the stock transfer provisions to expressly exclude from their application such transaction. That Congress has not by amendment expressly exempted the application of the stock transfer tax provisions to exclude the issuance of original stock to the nominee of a subscriber suggests that Congress did not intend to include such a transaction in the original act.

In 1928 *Union Trust Company* v. *Heiner, supra,* was promulgated. From that decision the Commissioner did not take an appeal. From 1928 to 1935 that decision, holding that the issuance to a subscriber of stock in the name of its nominee did not constitute a taxable transfer under the stock transfer tax was taken as law. During that period Congress would have had no occasion to amend the law unless it did not approve the decision rendered in the Heiner case.

In 1929 the Bureau of Internal Revenue published a ruling that transfers of stock to the nominee of a broker were not taxable under the stock transfer tax provisions of the Revenue Act of 1926. On March 9, 1936, the Bureau of Internal Revenue published another decision reversing its former position. When this action was brought to the attention of the Congress it adopted the amendment above referred to, expressly exempting transfers of stock to a nominee of a broker. See Report of Ways and Means Committee, House Report No. 3023, 74th Congress, 2d Session, page 2.

The two amendments made to the Revenue Act of 1926 exempting certain transfers of the legal title to stock pertain to transactions admittedly involving transfers of title. *The question involved in this appeal is not whether a transfer is taxable, but whether the transaction is a transfer.*

Conclusion.

Respondent contends that for the reasons stated the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 331

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

UNITED STATES OF AMERICA,
Petitioner,

vs.

A. B. LEACH & CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

R. J. BLAIR,
GEORGE K. BOWDEN,
Attorneys for Respondent.

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OPINIONS BELOW.

The memorandum opinion of the District Court (Rec. 8) is not reported. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 84 Fed. (2d) at page 908.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 30, 1936. The petition for certiorari was filed in this court on the 1st day of September, A. D. 1936.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE ISSUE.

The respondent is a corporation engaged in the brokerage business. To facilitate the transfer of securities dealt in, respondent adopted the practice of taking the securities in the name of an individual instead of its corporate name. In the transactions here involved, stocks were purchased by the respondent and were taken by it in the name of one of its employees. The respondent paid one stamp tax upon this transfer. The government claims it should pay a second tax because the stock was taken in the name of an employee.

The question presented is whether or not the respondent, by acquiring this stock in the name of its employee through this single transaction, is to be subjected to two stamp taxes under the Revenue Act of 1926.

STATEMENT.

The facts are adequately stated in the government's petion and will not be restated here.

ARGUMENT.

The provision of the statute under which the government has asserted the tax is Schedule A (3), Section 800, Title VIII, of the Revenue Act of 1926, which provides for a tax of 2 cents per share on:

> "* * * *all sales*, or agreements to sell, or memoranda of sales or deliveries of, *or transfers of legal title to shares or certificates of stock* or of profits or of interest in property or accumulations of any corporation, *or to rights to subscribe for or to receive such shares or certificates.* * * *" (Italics supplied.)

1. The petitioner incorporates by reference, its argument made in the petition for certiorari in *United States* v. *Automatic Washer Company*, No. 330, October Term, stating on page 5:

> "The reasons advanced in the petition for certiorari in the *Automatic Washer* case, No. 330, are applicable to the present case."

This is done in an attempt to bring the instant case within the principles of the case of *Raybestos-Manhattan, Inc.* v. *United States*, 296 U. S. 60, advanced as a major reason to support the petition for certiorari in the *Automatic Washer* case.

Neither the *Automatic Washer* case nor the *Raybestos-Manhattan* case involved the issue presented in this proceeding. The *Raybestos-Manhattan* case involved the reorganization of a corporation, whereby the old corporation conveyed all its assets to a new corporation in return for stock in the new corporation. The stock of the new corporation was not issued to the old corporation, but instead was issued directly to the stockholders thereof. This court

held that there were two transfers of the stock; one, to the old corporation, and the other, from the old corporation to its stockholders. Both transfers were taxable.

The *Raybestos-Manhattan* case is not a nominee case. The old corporation had the right to receive the stock of the new corporation. It transferred this right and all other right, title, and interest in the stock to its stockholders. The stockholders took this stock not as nominees, but as owners. In the instant case, the nominee, Vercouter, did not acquire any right to receive the stock. The respondent did not contemplate the transfer of any right to Vercouter. The stock was merely taken in his name by the respondent.

The court below considered and dismissed the possibility that the *Raybestos Manhattan* case was applicable to the facts in the instant case and stated (Rec. 26):

> "Certainly this does not present the shortcut in transfer of interest held taxable in the case of *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60. Here there is no such shortcut, for there is no transfer either of legal title or beneficial interest."

There is no indication from the language of the *Raybestos-Manhattan* case that the principle established therein was meant to be extended to cover the situation presented in this proceeding.

The *Automatic Washer* case also involved a reorganization of a corporation whereby all the assets of the old corporation were delivered to a new corporation in exchange for stock. By previous contract, the stockholders had agreed that a part of the stock of the new corporation should be transferred to one Nelson, who was vested with a power of attorney to execute a sale of that part of the stock to a group of bankers. The stock was issued directly from the new corporation to Nelson. A stamp tax was paid on the transfer to the old corporation and on the transfer from the old corporation to Nelson. The govern-

ment asserted an additional tax on the supposed transfer from the old corporation to its stockholders. The taxpayer denies that the stockholders had the right to receive the stock. It does not deny that Nelson, as nominee, acquired the right to receive such stock.

In the *Automatic Washer* case and in the *Raybestos-Manhattan* case the question was whether or not the purported transferor had any right to receive the stock which it could transfer. In the instant case it is admitted that the respondent had the right to receive, and all other rights and interest, in the stock. Here, however, no transfer of title, right, or interest was made, the stock merely being taken by the respondent in the name of its nominee.

It is apparent that the petitioner's argument, advanced in the petition for certiorari in the *Automatic Washer* case, is not applicable here and that reference to it was made merely to inject into this proceeding the decision of the *Raybestos-Manhattan* case, which is equally inapplicable.

2. To sustain its contention as to the importance of the question involved, the petitioner, in the petition filed in the case of *United States* v. *Automatic Washer Company*, No. 330, states on page 11:

> "The question involved herein will continue to arise since the 1932 Revenue Act, Section 723, continues the same provision."

An examination of this provision of the Revenue Act of 1932, as amended, refutes this contention. As amended, the pertinent portion of Section 723 (a) of the Revenue Act of 1932, applicable to nominee cases, reads as follows:

> *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker *or his registered nominee* for sale, nor upon deliveries or transfers by a broker *or his registered nominee* to a customer for whom and upon whose order *the broker* has purchased same, *nor upon deliveries or transfers by*

a purchasing broker to his registered nominee if the shares or certificates so delivered or transferred are to be held by such nominee for the same purpose as if held by the broker, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts. * * * (Amendment indicated in italics.)

Section 723 of the Revenue Act of 1932 was made effective fifteen days after its enactment on June 6, 1932. The above quoted amendment was made on June 29, 1936, by virtue of Public No. 842, 74th Congress. The amendment to Section 723 does not change the effective date of that statute and it would appear that the effective date is that specified by Section 723 in the Revenue Act of 1932. It is patent that this amendment was specifically intended to avoid any possibility of the double tax, asserted herein, upon corporate brokers who are forced to act through individual nominees. To eliminate this issue from litigation the petitioner need only give effect to Section 723 (a) of the Revenue Act of 1932 as amended.

Owing to discrepancies in the corporation laws of the different states and to the difficulty of ascertaining corporate capacity and the authority of officers of corporations to make transfers, it has become necessary for corporate brokers to deal almost exclusively through individual nominees. The provision in the statute imposing a stamp tax on transfers of stock has been in force in language identical with Section 800, Title VIII, Schedule A (3), of the 1926 Act since 1918. Long prior to, and ever since, that date corporate brokers have consistently indulged in the practice of dealing through nominees. Judicial approval of a similar practice was given in the interpretation of a stamp tax act as early as 1902. *United States* v. *Clawson, et al.*, 119 Fed. 994. There a contention similar to that of the petitioner herein was advanced by the United States and rejected by the court.

From the first enactment of the stamp tax provision in its present form in 1918, up to recent years, the government has not deemed the question of sufficient importance to assert a tax in the thousands of transactions involving nominees. Its recent attempts to collect a double tax from corporate brokers has resulted in the precise issue involved herein being decided adversely to the petitioner in all of the following cases:

Union Trust Company v. *Heiner*, 26 Fed. (2d) 391 (W. D. Pa.), decided Feb. 8, 1928.

Dean v. *Caldwell and Company*, 9 Fed. Supp. 177 (M. D. Tenn.), decided March 19, 1934.

Field Glore and Company v. *United States* (N. D. Ill.), decided April 8, 1935.

Field Glore and Company v. *United States* (N. D. Ill.), decided April 8, 1935.

It is worthy of note that the government has not regarded the question of sufficient moment to justify the prosecution of an appeal in any of these cases. In view of the history of litigation upon the issue and the amendment of Section 723 of the Revenue Act of 1932, it cannot seriously be contended that the issue is of sufficient importance to warrant the granting of certiorari.

3. The petitioner, in support of its petition for certiorari, relies upon the case of *Founders General Corporation* v. *Hoey*, 84 Fed. (2d) 976 (C. C. A. 2). That case was decided upon its own peculiar set of facts and is not in conflict with the opinion below. In the *Founders General* case the appellant contracted to purchase certain shares of stock from the United States Electrical Power Corporation, to be delivered on September 17, 1929. Subsequent to that, but prior to the date set for delivery, appellant directed the seller to issue the securities in the name of Benton and Company and on that date the stock was so issued. Benton and Company was a partnership organ-

ized solely for the purpose of receiving stock in its name to be held for the Founders General Corporation. It did so pursuant to a formal contract and for this service it received an annual fee of $1,500.00. As set forth in the opinion, page 977, this contract provided that Benton and Company was appointed agent

> "for the limited purpose of holding in the firm name stocks, bonds, notes, and other securities and property as agent (other than commission agent or broker) for the account of the Corporation and of otherwise acting with respect thereto in accordance, but only in accordance with the written instructions of the Corporation. * * *"

It also provided that Benton and Company should have no beneficial interest in the securities so held, that it waived all right, title, and interest in any securities held or received by it, and that the Founders General Corporation was appointed the agent and attorney of Benton and Company with full power to sell, assign, endorse, transfer, and deliver such securities. The Power Corporation paid the stamp tax upon the issuance of the stock. The Commissioner asserted a transfer tax upon the supposed transfer from the Founders General Corporation to Benton and Company.

Benton and Company was not a bare nominee, as it was formally vested with certain rights. The Founders General Corporation did not merely take the stock in the name of Benton and Company, but the surrounding facts indicate that a transfer of an interest was contemplated and made. That they waived, by express provision, any right, title, or interest to the stocks so held would serve to indicate that it was contemplated by the Founders General Corporation that some interest would be transferred to Benton and Company. By virtue of the provision appointing the Founders General Corporation as agent of Benton and Company to sell, assign, and transfer the stocks they

recognized that Benton and Company was clothed with certain attributes of ownership which could be re-delegated. The sole business of Benton and Company, for which they received an annual compensation, was to receive and to hold shares of stock for the Founders General Corporation. All the formal requirements of a transfer of interest are present in this transaction.

None of these requirements are present in the instant case. There are no facts which would indicate that it was ever contemplated that any interest be transferred. There was no formal contract. Vercouter, the nominee, received no consideration for the use of his name. He waived no interest in the stock for the obvious reason that he acquired none to waive. The most that could be said is that the respondent used the name of Vercouter to effect the transfer. The use of the name "Vercouter" in receiving the stock is exactly the same as if the respondent had accepted it in the name of "A. B. Leach & Co." or "A. B. Leach & Co., Account No. 1." No different legal problem would be presented. Vercouter *was* A. B. Leach & Co.

This is obviously not the situation where the parties, as in the *Founders General Corporation* case, expressly provide by formal contract for the protection of the corporation's interest which they contemplated might be transferred.

That the court in the *Founders General Corporation* case did not deem it necessary to distinguish the case of *White* v. *Consolidated Equities, Inc.*, 78 Fed. (2d) 435 (C. C. A. 1), indicates that the *Founders General Corporation* case was decided solely upon its own unique set of facts.

This case is not within the principle announced in the *Raybestos-Manhattan* case, which decided the only important point not covered by the change in the stamp tax

provision of the Revenue Act. The issue involved herein can no longer arise since the amendment to the Revenue Act. The case is not in conflict with the *Founders General Corporation* case and is not of sufficient importance to warrant the granting of certiorari.

Wherefore it is respectfully submitted that the petition for a writ of certiorari be denied.

E. J. BLAIR,
GEORGE K. BOWDEN,
Attorneys for Respondent.

October 1, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 330

THE UNITED STATES, PETITIONER
vs.
AUTOMATIC WASHER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In Court of Claims

No. 42525

AUTOMATIC WASHER COMPANY, A CORPORATION, PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

I. *Petition*

Filed October 14, 1933

To the Honorable, the Chief Justice and the Judges of the Court of Claims:

The claimant, Automatic Washer Company, a corporation, respectfully represents:

I

That it is, and was at all times hereinafter mentioned, a corporation duly created by law and having its principal office and place of business in the City of Newton in the State of Iowa, where it is engaged in the manufacture and sale of electric washing machines.

2 II

That by a written agreement dated June 22, 1928, and modified by certain subsequent agreements, plaintiff acquired, in September 1928, from a corporation known as the Automatic Electric Washer Company, all of the assets, franchises and other properties of every kind and description of the said Automatic Electric Washer Company. Said agreement provided in part that in consideration of the conveyance of said property and assets to it, plaintiff would deliver to the stockholders of the Automatic Electric Washer Company thirty-four thousand, five hundred and thirty-eight (34,538) shares of plaintiff's convertible preference stock of no par value and one hundred and forty thousand (140,000) shares of its common stock of no par value.

Pursuant to said agreement, plaintiff issued and delivered to the stockholders of the said Automatic Electric Washer Company and their nominee or attorney-in-fact as hereinafter set out, the said 34,538 shares of preference stock and 140,000 shares of common stock and duly paid thereon to the proper Collector of Internal Revenue the stamp taxes provided for by Schedule A(2) of Title VIII of the Revenue Act of 1926.

Of said shares thus issued and delivered, the 34,538 shares of preference stock and 40,000 of the 140,000 shares of common stock were issued and delivered, upon the instructions of the stockholders of the said Automatic Electric Washer Company to one H. E. Nelson, as nominee and attorney-in-fact for said stockholders, and were by him transferred and delivered, pursuant to the terms of the agreement aforesaid, to a firm of investment bankers who paid
3 to the said Nelson an agreed sum of money which was, by the said Nelson, distributed pro rata to the stockholders of the Automatic Electric Washer Company. That the stamp tax provided for by Schedule A(3) of Title VIII of the Revenue Act of 1926 was duly paid upon said transfers to said investment bankers.

III

That Schedule A of Title VIII of the Revenue Act of 1926 imposes liabilities for stamp taxes, among others, upon

"2. Capital stock, issued: On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents: Provided, That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent on each $20 of actual value, or fraction thereof.

"3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers, of legal title to shares of certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling
4 the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100.00 of face value or fraction thereof, 2 cents, and where such shares are without par or face value the tax shall be 2 cents on the transfer or sale or agreement to sell on each share."

IV

That thereafter, to wit, during the year 1930, the Commissioner of Internal Revenue demanded of petitioner additional stamp taxes in respect of the foregoing transactions in the sum of $1,593.63 based upon the alleged claim that the said stockholder of the Automatic Washer Company had transferred to the said Nelson, in connection with the foregoing transactions, their so-called "right to receive" the said shares issued to the said Nelson by petitioner and that said

alleged transfer of the said alleged right to receive was taxable under the provisions of Schedule A(3) of Title VIII of the Revenue Act of 1926. That petitioner, under duress and threat of distraint, paid to the Collector of Internal Revenue, under protest, on the 4th day of May 1931 the said sum of $1,593.63.

That thereafter, to wit, on or about the 12th day of June 1931 petitioner duly filed an application to the Commissioner of Internal Revenue, to wit, a claim for refund praying for the return of the said sum of $1,593.63 with interest upon the ground that there was no stamp tax liability incurred in respect of which the said tax had been collected from it. Said application was in all respects regular and in accordance with the law and regulations and was accompanied by all the evidence and proof of facts. The facts alleged in said application were not traversed or denied by the Secretary
5 of the Treasury or the Commissioner of Internal Revenue or by any representative of the United States. Although said application was in all respects complete and in due form, nevertheless, on or about the 10th day of November 1931, the Commissioner of Internal Revenue rejected and denied said application and has continuously denied and refused to pay your petitioner the moneys asked for and demanded, as aforesaid.

V

That thereafter, to wit, during the year 1931, the Commissioner of Internal Revenue demanded still further stamp taxes from petitioner upon the alleged claim that the Automatic Electric Washer Company had transferred, under said agreement, to its stockholders an alleged right of the said Automatic Electric Washer Company to receive the 34,538 shares of preference stock and 140,000 shares of common stock, referred to above. Acting under the alleged authority of Schedule A(3) of Title VIII of the Revenue Act of 1926, the Commissioner of Internal Revenue assessed against and demanded from petitioner the further sum of $4,020.46 as additional stamp taxes upon the ground above-mentioned.

That petitioner, under duress and threat of distraint did, on or about the 17th day of November 1932, under protest, pay to the Collector of Internal Revenue the sum of $4,020.46 above indicated.

That on or about the 31st day of March 1933, petitioner duly filed an application with the Commissioner of Internal Revenue, to wit a claim for refund, praying for the refund of $4,020.46, with interest, upon the ground that the alleged transaction, upon which the same was assessed and collected, did not create any liability for said
6 tax. Said application was in all respects regular and in accordance with the law and regulations and was accompanied by all the necessary evidence and proof of facts. The facts alleged in said application were not traversed or denied by the Secretary of the Treasury or the Commissioner of Internal Revenue or by any representative of the United States. Although said application was

in all respects complete and in due form, nevertheless, on or about the 13th day of June 1933, the Commissioner of Internal Revenue rejected and denied the said application and has continuously denied and refused to pay your petitioner the moneys asked for and demanded, as aforesaid.

VI

Your petitioner is advised by counsel and, therefore, avers that the stamp taxes in the sums of $1,593.63 and $4,020.46, respectively, collected from it, as above set out, were illegally and erroneously collected for the following reasons, to wit:

That Schedule A (3) of Title VIII of the Revenue Act of 1926 does not impose any liability for stamp taxes upon either (a) the alleged transfer to the said Nelson, under the circumstances above set out, of the alleged right of the stockholders of the Automatic Electric Washer Company to receive said stock or upon (b) the alleged transfer to the stockholders of the Automatic Electric Washer Company of the alleged right of the Automatic Electric Washer Company to receive said shares of stock from petitioner; that the said statute contains no authority for the assessment or collection of said taxes in either instance and that the same were illegally and unlawfully demanded and collected from petitioner over the protest in each instance of this petitioner.

7 VII

No action upon this claim other than herein set forth has been taken before Congress or any other of the Departments of the Government.

VIII

Your petitioner avers that there is justly due and owing it, on account of the matters hereinbefore set forth, the sum of $1,593.63, with interest from May 4, 1931, and the further sum of $4,020.46, with interest from November 17, 1932, after deducting all just offsets and payments on the part of the United States; that it is the sole owner of the claim herein sued upon, and that no assignment or transfer of the claim or any part thereof, or any interest in the same has been made; that it is a citizen of the United States and loyal to the United States Government and has not at any time aided or abetted in any manner or given comfort to any sovereign government that is, or ever has been, at war with the United States.

Wherefore, your petitioner prays judgment against the United States in the sum of $1,593.63, with interest from May 4, 1931, and the further sum of $4,020.46, with interest from November 17, 1932, until paid.

AUTOMATIC WASHER COMPANY,
By JESSE I. MILLER,
Attorney for Claimant.

8 [*Duly sworn to by Jesse I. Miller, jurat omitted in printing.*]

II. *General traverse*

Filed November 23, 1933

And now comes the attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANK J. WIDEMAN,
Assistant Attorney General.

III. *Argument and submission of case*

On April 8, 1936, the case was argued and submitted on merits by Mr. Jesse I. Miller for plaintiff, and by Mr. John W. Blalock for defendant.

9 IV. *Special findings of fact, conclusion of law, and opinion of the court by Booth, Chief Justice*

Filed June 1, 1936

Mr. Jesse I. Miller for the plaintiff.

Mr. J. W. Blalock, with whom was Mr. Assistant Attorney General Robert H. Jackson, for the defendant.

This case having been heard by the Court of Claims, the court upon a stipulation by the parties makes the following

Special findings of fact

1. Plaintiff, Automatic Washer Company, (hereinafter referred to as the "new company") is a corporation organized under the laws of the State of Delaware and having its principal place of business in the City of Newton, Iowa, where it is engaged in the business of manufacturing electric washing machines. Plaintiff's predecessor as owner of that business was Automatic Electric Washer Company, an Iowa corporation, hereinater reerred to as the "old company."

2. On June 22, 1928, one Harry E. Nelson, a stockholder and officer of the old company, entered into an agreement with Folds, Buck and Company, a corporation, hereinafter referred to as the "Bankers", the material portions of which were as follows:

10 That he (Nelson) proposes to cause a reorganization of the Old Company whereby a new corporation to be organized under the laws of the State of Delaware (hereinafter called the "New Company") shall acquire all of the properties and assets of the Old Company. Upon such reorganization having been effected, the capitalization of the New Company shall be as follows:

"Convertible preference stock, without any nominal or par value, authorized 40,000 shares; outstanding 40,000 shares;

"Common stock, without any nominal or par value, authorized 180,000 shares; outstanding 180,000 shares, of which 40,000 shares shall be in the treasury of the company.".

Upon such reorganization having been effected, Nelson will desire to sell to the Bankers, upon the terms and conditions hereinafter stated, 40,000 shares of said convertible preference stock and 40,000 shares of said common stock at the aggregate price of $1,000,000.

It is therefore agreed between the parties as follows:

Nelson hereby grants to the Bankers the option and privilege of purchasing 40,000 shares of said convertible preference stock and 40,000 shares of said common stock at the price aforesaid.

3. Pursuant to this agreement, the new corporation was organized and thereafter, about September 27, 1928, entered into an agreement with the old company, the material portions of which were as follows:

"Automatic Washer Company, a corporation of the State of Delaware, has been organized at the instance of the stockholders of the Old Company to acquire all the property and assets and assume all the obligations of the Old Company reflected by its balance sheet as of June 30, 1928, prepared and certified to by Arthur Anderson & Company, of Chicago, Illinois, and such obligations as have resulted from the usual and ordinary conduct of the business of the Old Company subsequent to June 30, 1928. * * *

"The capital stock of the Old Company and the New Company are as follows:

Automatic Electric Washer Co., Inc. (Old Company)

Authorized—	*Outstanding*
6,150 shares common stock (par value $100 per share)	3,412 shares

11 *Automatic Washer Company (New Company)*

Authorized—	*To be presently outstanding*
40,000 shares Convertible preference stock (without any nominal or par value)	40,000 shares
180,000 shares common stock (without any nominal or par value)	140,000 shares
(40,000 shares of common stock are to be reserved for the conversion of convertible preference shares).. * * *	

All of the property and assets of the Old Company shall be conveyed to the New Company, and the New Company shall assume all of the liabilities of the Old Company disclosed by its Balance Sheet as of June 30, 1928, a copy of which is appended to this plan and marked "Exhibit A", and such liabilities of the Old Company as have resulted from the usual and ordinary conduct of the business of the Old Company subsequent to June 30, 1928. The Old Company agrees that it has no other liabilities. As consideration for such conveyance of said property and asests, the New Company shall deliver to the stockholders of the Old Company the following securities of the New Company:

Convertible Preference Stock (without any nominal or par value)	34,538 shares
Common Stock without nominal or par value	140,000 shares

Immediately upon the conveyance of all of the assets of the Old Company to the New Company, the stockholders of the Old Company shall be in control of the New Company. * * *

As a part of the plan of reorganization, the stockholders of the Old Company have agreed among themselves that each will contribute the shares of convertible preference stock of the New Company received by such stockholder in his pro-rata proportion of 40,000 shares of the common stock of the New Company, and that the total shares so contributed, viz: 34,538 shares of Convertible preference stock and 40,000 shares of common stock, shall be sold and delivered to Folds, Buck & Co. Bankers, of Chicago, Illinois, under the provisions of the agreement of date June 22, 1928 (as amended from time to time), between H. E. Nelson (acting as agent for all of the stockholders) and said Bankers. In order to carry out this plan whereby the stockholders of the Old Company will sell and deliver to the said Bankers
said 34,538 shares of the convertible preference stock and 40,000
12 shares of the common stock of the New Company, each of the
stockholders of the Old Company has irrevocably constituted and appointed H. E. Nelson and W. N. Gallagher his attorneys in fact to receive the respective securities of the New Company to which such stockholder may be entitled and to make sale of that portion thereof to be contributed by such stockholder for the purpose of carrying out said agreement of sale with the Bankers and to receive the purchase price for all of said shares of stock so sold and delivered to the Bankers, and distribute to each of the stockholders of the Old Company his proportionate share of the proceeds of such sale, after deducting all expenses of the said attorneys in fact therefrom.

Accordingly, the New Company, in making delivery to the stockholders of the Old Company of the shares of stock agreed to be delivered as consideration for the acquisition of the property and assets of the Old Company shall issue such certificates in such names and for such amounts as shall be specified in the joint order of the said H. E. Nelson and W. N. Gallagher, the attorneys in fact for each of the stockholders of the Old Company, and deliver the same to said attorneys in fact, and certificates evidencing 34,538 shares of convertible preference stock and 40,000 shares of common stock shall be delivered by said attorneys in fact to or upon the order of Folds, Buck & Co., upon receipt of the sum of $868,912.00 (less the expenses to be deducted therefrom).

Upon the delivery by the said H. E. Nelson and/or W. N. Gallagher to said Folds, Buck & Co., of said 40,000 shares of Common Stock and said 34,538 shares of Convertible Preference Stock, and the receipt by the said H. E. Nelson and/or W. N. Gallagher of the said sum of $868,912.00 (less the expenses of Folds, Buck & Co., provided to be deducted), the said H. E. Nelson and/or W. N. Gallagher shall cause to be paid from the cash so received all expenses incurred by them and shall distribute to each stockholder of the Old Company for whom they have been so acting the following:

1. 1/3412 of the remaining cash for each share of Common Stock of the Old Company held by such stockholder.

2. 29.3 shares of Common Stock for each share of Common Stock held by such stockholder in the Old Company, being 1/3412 of the shares of stock distributable to the stockholders of the Old Company (other than shares so sold to Folds, Buck & Co., as aforesaid).

13 4. The powers of attorney referred to in Finding 3 were identically executed by all of the stockholders of the old company on September 17, 1928, the material portions thereof being as follows:

"KNOW ALL MEN BY THESE PRESENTS, That I, ——— ———, do hereby nominate and appoint H. E. Nelson and W. N. Gallagher my true and lawful attorneys for me and in my name, place, and stead, at a special meeting of the Stockholders of Automatic Electric Washer Co., Inc. (hereinafter called the "Old Company"), to be held at the office of the Old Company, in the City of Newton, Iowa, on the 27th day of September 1928, at ten o'clock a. m., and at any and all adjournments of said meeting to vote upon all the stock of the Old Company owned and/or controlled by me or standing in my name or which for any reason I am or shall be entitled to vote upon any and all questions, matters, and/or business which may come before said meeting and particularly to vote upon the following matters and things: * * *

"I do hereby authorize, direct, and require that my said attorneys or either of them receipt for and receive any and all dividends declared of the Old Company by way of liquidation or otherwise and to sell, exchange or dispose of, for me and in my behalf any and/or all property or assets so received, including all or any portion of the shares of stock or other securities of the New Company accruing to me, or to which I am or may become entitled by reason of the consummation of any plan of reorganization of the affairs of the Old Company and particularly I do hereby authorize and direct my said attorneys in fact to sell and dispose of any and/or all such shares of stock and/or securities in consummating the agreement or agreements now existing between the said H. E. Nelson and Folds, Buck & Company of Chicago, Illinois, as the same may from time to time be amended with the consent of the said H. E. Nelson.

"I do hereby declare that in consideration of H. E. Nelson having made an agreement or agreements with Folds, Buck & Co. of Chicago, Illinois, for my benefit and the benefit of the other stockholders of the Old Company, in reliance upon my promise to execute and deliver this proxy and power of attorney the same shall continue in full force and effect until November 15, 1928, and shall not be subject to revocation."

14 5. Pursuant to these several agreements and authorizations, the old company, about October 1, 1928, transferred and conveyed to the new company all its assets, subject to all its liabilities,

and the new company thereupon, issued 140,000 shares of its common and 34,538 shares of its convertible preference stock as follows:

"100,000 shares of common stock to the individual stockholders of the old company in the ratios of their respective stock holdings in the old company;

"40,000 shares of common stock to the said Harry E. Nelson, pursuant to said powers of attorney, of which 7,069 shares were said Nelson's pro rata portion, as a stockholder of the old company, of the new common stock to be sold to the Bankers; and

"34,538 shares of convertible preference stock to the said Harry E. Nelson pursuant to the said powers of attorney, of which 6,104 shares were said Nelson's pro rata portion, as a stockholder of the old company, of the new convertible preference stock to be sold to the Bankers."

6. Nelson thereupon sold and transferred to the Bankers the said 40,000 shares of common and 34,538 shares of preference stock, collected the proceeds thereof, and distributed the same among the stockholders of the old company.

7. Upon the original issue of the 140,000 shares of common and 34,538 shares of convertible preference stock, the new company duly paid the stamp tax imposed by Schedule A (2) of Title VIII of the Revenue Act of 1926 on each original issue of capital stock. It also duly paid the stamp tax imposed by Schedule A (3) of Title VIII on the subsequent transfer by Nelson to the Bankers of the 40,000 shares of common and 34,538 shares of convertible preference stock.

8. Thereafter the Commissioner of Internal Revenue demanded and collected from plaintiff, by threat of distraint and over plaintiff's protest, two additional stamp taxes on the foregoing transactions, alleged by him to be due and owing under Schedule A (3) of Title VIII upon the transfers of certain alleged rights to receive said shares of stock, viz:

(a) On November 17, 1932, a tax of $4,020.46 on the alleged
15 transfer by the old company to its stockholders of its alleged right to receive from the new company 140,000 shares of common and 34,538 shares of convertible preference stock, and

(b) On May 4, 1931, a stamp tax of $1,490.76 on the alleged transfer by the old stockholders to Nelson of their alleged rights to receive the 40,000 shares of common and 34,538 shares of convertible preference stock ultimately sold to the Bankers, and, in addition, a penalty of $74.54 and interest in the sum of $28.33, or a total of $1,593.63.

9. The validity of the tax of $4,020.46 referred to in Finding 8 (a), has been sustained by the Supreme Court of the United States in Raybestos-Manhattan Company v. United States, 296 U. S. 60, and plaintiff has abandoned and withdrawn its claim in respect of this item.

10. In respect of the item of $1,593.63, referred to in Finding 8 (b), plaintiff, on or about June 12, 1931, duly filed an application to the

Commissioner of Internal Revenue, to wit, a claim for refund, praying for the return of the sum of $1,593.63, with interest, which claim was rejected by the Commissioner of Internal Revenue on or about November 10, 1931, and no part of which has ever been allowed or paid.

11. Plaintiff is the sole owner of the claim herein sued upon, and no assignment or transfer thereof or any part thereof, or any interest in the same, has been made. Plaintiff is a citizen of the United States and loyal to the United States Government, and has not at any time aided or abetted in any manner or given comfort to any sovereign government that is or ever has been at war with the United States.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $1,593.63 with interest.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one thousand five hundred and ninety-three dollars and sixty-three cents ($1,593.63), with interest at six percent per annum as provided by law.

16 *Opinion*

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, a Delaware corporation, sues to recover the amount of stamp taxes, interest, and penalty alleged to have been exacted by the Commissioner of Internal Revenue without warrant of law. The facts have been stipulated and no jurisdictional issue is involved.

The plaintiff is a successor corporation of the Automatic Electric Washer Company, (incorporated under the laws of Iowa, and the controversy to be adjudicated revolves around a reorganization of the Iowa company. In this opinion, following the findings, we will designate the Iowa corporation as the "old company" and the plaintiff as the "new company."

Harry E. Nelson, a substantial stockholder in the old company preliminary to the reorganization of the same on June 22, 1928, granted in a written agreement an option to Folds, Buck & Company, hereafter known as the "Bankers", to purchase 40,000 shares of the convertible preferred and 40,000 shares of the common stock of the new company when the same was incorporated.

Nelson's reorganization plan comprehended the purchase by the new company of all the assets of the old one. The sale was to be accomplished by the issuance by the new company of 40,000 shares of convertible preferred and 180,000 shares of common stock to be, less 40,000 shares of common reserved as Treasury stock distributed among the stockholders of the old company as their stock interest in the old company appeared.

The new company was duly incorporated and subsequent thereto, i. e. on September 27, 1928, by the terms of an express agreement, carried out Nelson's original plan of reorganization as evidenced by the agreement of June 22, 1928, except in determining the pro rata contribution by the stockholders of the old company to the stock to be sold to the Bankers, the amount of the preferred to be sold was reduced to 34,538 shares.

The agreement of September 27, 1928, contained a provision whereby H. E. Nelson and W. N. Gallagher or either one of them,
17 acting under duly executed powers of attorney from the stockholders of the old company, should receive from the new one certificates of stock therein in accord with the powers of attorney, to the extent of 34,538 shares of convertible preferred and 40,000 shares of common, which in turn were to be sold and transferred to the Bankers for the sum of $868,912 and the proceeds distributed by Nelson among the stockholders of the old company for whom he was acting as attorney in fact as their interest therein appeared. In other words, the September agreement ratified the one of June 22, 1928, with additional provisions essential to complete the reorganization.

The findings disclose the agreements and the form of the powers of attorney. Gallagher did not act thereunder. Nelson alone acted. The statutes and regulations governing the case are as follows:

Section 800 of the Revenue Act of 1926 provides that:

"On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title * * * the several taxes specified in such schedule. * * *"

Schedule A (3) reads as follows:

"3. Capital stock, sales, or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock * * * or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share; * * *."

Regulation 71, relating to stamp taxes on documents imposed by the Revenue Act of 1926 and the Revenue Act of 1928, contains the following provisions:

18 "ART. 31. BASIS OF TAX.—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale * * * or delivery

of or transfer of the legal title to shares, or certificates of stock * * * or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificates, or agreement or memorandum of sale.

"ART. 34. SALES AND TRANSFERS SUBJECT TO TAX.—The following transactions are subject to the tax:

"(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

"(b) The sale or transfer of shares of stock, whether or not represented by certificates.

"(c) The transfer of stock to or by trustees."

* * * * * * *

"(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

"(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

* * * * * * *

"(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

"(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock."

The process of completing the reorganization of the companies exacted, as stipulated by the parties, stamp taxes on first, the original issue of all the stock issued by the new company, second on the old company's transfer of its right to receive the new company's stock, third, on Nelson's transfer of the stock coming to him under the power of attorney to the Bankers, and, finally, upon the Bankers' sale of the stock to the public. With respect to these transactions the proper stamp taxes were fully paid.

The defendant contends that inasmuch as the new company was obligated to and did issue 100,000 shares of its common stock directly to the stockholders of the old company in the ratio of their respective holdings, and 40,000 shares of common stock, together with 34,538 shares of preferred stock, to Nelson, acting as attorney in fact
19 for the stockholders legal title to the last-named shares vested in Nelson. Therefore, the right to receive the stock Nelson sold to the bankers had to be transferred to Nelson in order to execute the sale to the bankers.

The argument advanced overlooks the decision of the Supreme Court in the case of Raybestos-Manhattan Co. v. United States, 296 U. S. 60. The right to receive the stock of the new company was under the foregoing decision vested in the old company, and upon the transfer of this right to its stockholders the old company paid a stamp tax of $4,020.46, which the plaintiff now concedes it may not recover.

The findings conclude the plaintiff's right to recover a judgment. The status of the transaction clearly shows that what the stockholders of the old company did was to appoint an intermediary, an agent in fact, acting under powers of attorney, to execute for them a pre-existing agreement to sell to the bankers the stock involved. This the attorney did, and upon the transfer of said stock paid the stamp tax exacted under the revenue act. National Bond and Share Corporation v. Hoey, 364 CCH, p. 9755.

Nelson, the stockholders' attorney in fact, owned in his own right 7,069 shares of common and 6,104 shares of preferred stock in the new company, i. e., he received this stock as his pro rata portion of the new stock because of his stock ownership in the old company, and this block of stock represented his contribution to the total amount of stock sold to the bankers. The defendant concedes that in no event would Nelson be taxable under the contention in this case.

The plaintiff is entitled to a judgment as follows: $1,490.76 tax paid, to which was added $74.54 penalty and $28.33 interest, totalling $1,593.63, with interest as allowed by law. It is so ordered.

WHALEY, Judge; WILLIAMS, Judge; LITTLETON, Judge; and GREEN, Judge, concur.

20 V. *Judgment*

At a Court of Claims held in the City of Washington on the 1st day of June A. D. 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $1,593.63 with interest.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one thousand five hundred ninety-three dollars and sixty-three cents ($1,593.63), with interest at six per cent per annum as provided by law.

21 [Clerk's Certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1936

Supreme Court of the United States

Order allowing certiorari

Filed October 19, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 330

THE UNITED STATES, PETITIONER

v.

AUTOMATIC WASHER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled cause.

OPINION BELOW

The opinion of the Court of Claims is reported in 15 F. Supp. 70.

JURISDICTION

The judgment of the Court of Claims was entered on June 1, 1936. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

Stockholders of a corporation who were entitled, pursuant to a reorganization plan, to shares in a new corporation, agreed that certain of such shares should be delivered by the new corporation to a nominee of the stockholders, who was authorized to sell such shares for the account of the stockholders and to designate the names in which the stock certificates should be issued. Did this transaction involve a transfer by the stockholders to their nominee of a right to receive shares of stock, within the stamp tax provisions of the Revenue Act of 1926?

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Revenue Act of 1926 and regulations thereunder will be found in the Appendix, *infra,* pp. 12–14.

STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

Respondent, hereinafter referred to as the "new company", is a Delaware corporation, engaged in the business of manufacturing electric washing machines. Its predecessor, as owner of that business, was Automatic Electric Washer Company, an Iowa corporation, hereinafter referred to as the "old company" (Fdg. 1).

On June 22, 1928, one Nelson, a stockholder and officer of the old company, entered into an agreement with Folds, Buck and Company, hereinafter

referred to as the "Bankers", which provided that Nelson would bring about a reorganization of the old company, to be accomplished by the organization of a new corporation under the laws of Delaware, which would acquire all the assets of the old company; that the capital structure of the new corporation should consist of 180,000 shares of common stock, of which 40,000 shares were to be retained in the treasury, and 40,000 shares of convertible preference stock, both without par value; that upon such reorganization the Bankers should have the option and privilege of purchasing 40,000 shares of preference stock and 40,000 shares of common stock of the new company (Fdg. 2).

The new company was thereupon organized, and on or about September 27, 1928, entered into an agreement with the old company, which provided that the old company would convey all its assets to the new company, which would assume the liabilities of the old; and, as consideration for such conveyance, the new company would deliver to the stockholders of the old company 34,538 shares of convertible preference stock and 140,000 shares of common stock of the new company; that the stockholders of the old company, as had been agreed among themselves, would contribute the shares of convertible preference stock and a pro rata proportion of common stock received by each of them to make up the total of 34,538 shares of convertible preference stock and 40,000 shares of common stock which were to be sold to the Bankers; that

in order to carry out said sale each of the stockholders of the old company irrevocably appointed Nelson and one Gallagher attorneys in fact to receive the stock of the new company to which such stockholder might be entitled, and to make the sale thereof to the Bankers, distributing the proceeds of such sale pro rata to the stockholders of the old company; that accordingly the new company should issue certificates of its stock as ordered by Nelson and Gallagher to the amount of 34,538 shares of preference and 40,000 of common, which shares were to be delivered to Nelson and Gallagher for sale to the Bankers (Fdg. 3).

The powers of attorney theretofore executed by all the stockholders of the old company provided in part that Nelson and Gallagher were appointed attorneys for such stockholders; that said attorneys were authorized to receive the shares of stock of the new company accruing to such stockholders, and to sell such stock in consummating the agreement with the Bankers; and that said power of attorney was to remain in full force and effect until November 15, 1928, and should not be subject to revocation (Fdg. 4).

Under these agreements, on or about October 1, 1928, the old company transferred to the new company all assets and properties subject to all of its liabilities, and the new company thereupon issued 140,000 shares of its common stock and 34,538 shares of its convertible preference stock, delivered as follows: 100,000 shares of common to the in-

dividual stockholders of the old company in proportion to their holdings in the old company; 40,000 shares of common to Nelson (of which 7,069 shares were Nelson's pro rata portion, as a stockholder of the old company, of the new common stock to be sold to the Bankers); and 34,538 shares of convertible preference to Nelson (of which 6,104 shares were Nelson's pro rata portion, as a stockholder of the old company, of the preference stock to be sold to the Bankers) (Fdg. 5). Nelson thereupon sold and transferred to the Bankers 40,000 shares of common and 34,538 shares of preference stock, collecting the proceeds thereof and distributing the same among the stockholders of the old company (Fdg. 6).

The respondent duly paid the stamp tax imposed by the Revenue Act of 1926 on the original issue of 140,000 shares of common and 34,538 shares of preference stock. It also paid the stamp tax on the subsequent transfer by Nelson to the Bankers of the 40,000 shares of common and 34,538 shares of preference stock (Fdg. 7).

Thereafter the Commissioner of Internal Revenue demanded and collected from respondent two additional stamp taxes on the foregoing transactions, one of $4,020.46 on the transfer by the old company to its stockholders of the right to receive from the new company 140,000 shares of common and 34,538 shares of preference stock, and one of $1,593.63, including interest and penalty, on the transfer by the stockholders of the old company to

Nelson of their rights to receive the 40,000 shares of common and 34,538 shares of preference stock ultimately sold to the Bankers (Fdg. 8).

The validity of the tax of $4,020.46 on the transfer by the old company to its stockholders of the right to receive the stock of the new company was conceded by respondent in the court below, and the claim on this item was abandoned (Fdg. 9).

Respondent, on or about June 12, 1931, filed claim for refund in the amount of $1,593.63, representing the tax on the transfer by the old stockholders to Nelson. This claim was rejected by the Commissioner of Internal Revenue on or about November 10, 1931 (Fdg. 10).

Suit was brought in the Court of Claims on October 14, 1933, and on June 1, 1936, judgment was entered for the plaintiff in the amount of $1,593.63, with interest.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the transfer by the stockholders of the old company to their nominee of their right to receive stock in the new company was not subject to the stamp tax imposed by the Revenue Act of 1926.

2. In failing to hold that the transfer to Nelson of the stock ultimately sold to the Bankers was a taxable transfer under the statute.

3. In holding that respondent was entitled to recover $1,593.63, with interest, and entering judgment for respondent in said amount.

4. In failing to enter judgment for the United States and dismissing the petition.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Founders General Corporation* v. *Hoey,* decided July 6, 1936, not yet officially reported, but found in 1936 Prentice Hall, Volume I, Par. 1378. In that case the taxpayer corporation subscribed to shares in another corporation and directed that they be issued in the name of Benton & Co. as the taxpayer's nominee. Benton & Co. was a partnership whose sole business was to take and hold in its name securities belonging to the taxpayer. Neither the partnership nor any of its members had any interest in securities so held. The contract between the taxpayer and the partnership provided that the latter was appointed agent

> for the limited purpose of holding in the firm name * * * securities and property as agent (other than commission agent or broker) for the account of the Corporation and of otherwise acting with respect thereto in accordance, but only in accordance with the written instructions of the Corporation * * * *.

It was also provided that the partnership should have no "beneficial interest" in securities so held, and that it waived all right, title, and interest in any security held or received by it. The Court of

Appeals in that case held that the taxpayer corporation had transferred to its nominee the right to receive shares for which it subscribed, and that the imposition of a stamp tax in respect of that transfer was, under the statute, "inevitable."

The only substantial differences in the facts of that case and the case at bar serve to strengthen the conclusion that the Commissioner's determination in the present case was correct. In the *Founders General* case the securities were never actually delivered to the nominee, but were received by the taxpayer corporation itself. This circumstance was held not sufficient to defeat the tax, since the taxpayer corporation, by directing that the shares be issued in the name of its nominee, had transferred to the nominee the right to receive the shares. In the present case no such circumstance exists; not only the right to receive but actual receipt vested in the nominee. A second difference in the two cases is that, so far as appears in the *Founders General* case, the designation of the nominee and the powers vested in it were completely revocable; in the present case, on the other hand, the powers granted to the nominee were made irrevocable for a fixed period of time (Fdg. 4).

2. The decision below fails to apply the principles announced by this Court at the last Term in *Raybestos Manhattan Co.* v. *United States,* 296 U. S. 60. In holding the stamp tax provisions to be applicable in the circumstances there disclosed, this Court said (p. 64):

> Here the power to command the disposition of the shares included the right to receive them and the exercise of the power which transferred the right is subject to the tax.

It cannot be disputed that in the case at bar the power to command the disposition of the shares was in the stockholders. The right to receive the shares could be vested in others only by transfer from the stockholders themselves. This was fully recognized in the agreement between the old and the new corporations. That agreement recited that the stockholders agreed to "contribute" certain shares to be sold to the Bankers; that the "stockholders of the Old Company will sell and deliver to the said Bankers" the shares in question; and that Nelson and Gallagher had been appointed attorneys in fact "to receive the respective securities of the New Company to which such stockholder may be entitled" (Fdg. 3). It is, of course, immaterial that the stockholders did not receive the shares with respect to which they transferred rights to their nominee. In the *Raybestos Manhattan* case, *supra,* the old corporation was held to be a transferor where the securities were issued directly by the new corporation to the shareholders of the old.

As was said in the *Raybestos Manhattan* case, "The subject of the tax is not alone the transfer of ownership in shares of stock. It embraces transfers of rights to subscribe for or receive shares or

certificates, * * *" (p. 63). This conclusion, under which the transaction in the present case is subject to the tax, is clearly compelled by the language of the statute. Section 800–A (3) provides for a tax on all "transfers of legal title to shares or certificates of stock * * * or to rights to subscribe for or to receive such shares or certificates * * *." The regulations, *infra*, p. 14, provide (Article 34 (u)):

> Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

In holding the transaction in the present case to be non-taxable, the court below has in effect enlarged the class of exemptions provided in the statute.

3. The importance of the question presented is indicated by the frequency of litigation involving stamp taxes upon transfers by corporations to their nominees of the right to receive and dispose of stock. A decision in accord with that of the court below was rendered by the Circuit Court of Appeals for the Seventh Circuit on June 30, 1936, in *A. B. Leach & Co., Inc.*, v. *United States*, not yet officially reported but found in 1936 Prentice Hall, Vol. 1, par. 1362. The Government is petitioning for certiorari in the *Leach* case (No. 331, Present Term). The decision of the court below is also in accord with *Union Trust Co.* v. *Heiner*, 26 F. (2d) 391 (W. D. Pa.). The *Union Trust Co.* case was specifically disapproved by the Circuit Court of

Appeals for the Second Circuit in the *Founders General* case, *supra,* Judge A. N. Hand stating—

> It is plain that the court in *Union Trust Co.* v. *Heiner* ignored the express provision that the absence of any beneficial interest on the part of the holder should not exempt the transfer from taxation. The decision, therefore, proceeded on an indefensible theory. That decision has since been followed by various district courts, but we cannot avoid the conclusion that it is contrary to the plain meaning of the statute.[1]

The question involved herein will continue to arise, since the 1932 Revenue Act, section 723, continues the same provisions. Because of the importance of the question and the conflict of decisions in the lower courts, the application of the stamp tax provisions to transfers involving nominees without beneficial interest should be authoritatively settled by this Court.

Wherefore it is respectfully submitted that this petition for writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1936.

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[1] *Union Trust Co.* v. *Heiner* was followed in *Dean* v. *Caldwell & Co.*, 9 F. Supp. 177 (M. D. Tenn.), and *National Bond & Share Corp.* v. *Hoey*, 14 Fed. Supp. 787 (S. D. N. Y.). The latter decision can no longer be regarded as authoritative, in view of the decision of the Circuit Court of Appeals in the *Founders General* case.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, * * * the several taxes specified in such schedule. * * * (U. S. C., Title 26, Secs. 900, 908).

SCHEDULE A.—STAMP TAXES

* * * * *

2. *Capital stock, issue.*—On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents: *Provided,* That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent on each $20 of actual value or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

3. *Capital stock, sales or transfers.*—On all sales, or agreements to sell, or memo-

randa of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: * * * (U. S. C., Title 26, Sec. 901).

Treasury Regulations 71:

ART. 31. *Basis of tax.*—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to shares, or certificates of stock, or of profits, or of interest in property or accumulations in any corporation, joint-stock company, or association, or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

ART. 34. *Sales and transfers subject to tax.*—The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumu-

lations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

* * * * *

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

* * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 330

THE UNITED STATES, PETITIONER
v.
AUTOMATIC WASHER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 10–13) is reported in 15 F. Supp. 70.

JURISDICTION

The judgment of the Court of Claims was entered June 1, 1936 (R. 13). The petition for a writ of certiorari was filed September 1, 1936, and was granted October 19, 1936. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The assets of A corporation were conveyed to respondent corporation which agreed to deliver its

stock therefor directly to A's stockholders. Pursuant to the stockholders' direction, respondent issued certificates for part of the stock in the name of an individual appointed by the stockholders as their attorney in fact in the sale thereof for their account. Did this transaction involve a taxable transfer by the stockholders within the meaning of Section 800, Schedule A–3 of the Revenue Act of 1926?

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra,* pp. 20–22.

STATEMENT

This action was brought by respondent to recover documentary stamp taxes. The case was submitted upon an agreed stipulation of facts, and the findings of the Court of Claims may be summarized as follows:

Respondent, a Delaware corporation, hereinafter sometimes referred to as the "new company", was organized in June, 1928, to engage in the manufacture of electric washing machines. It succeeded to the business and assets of the Automatic Washer Company, an Iowa corporation, hereinafter referred to as the "old company." (R. 5.)

On June 22, 1928, an agreement was entered into between one Nelson, a stockholder and officer of the old company, and Folds, Buck and Company, Bankers, whereby Nelson proposed to reorganize the old company by organizing a new corporation

under the laws of Delaware to acquire all the assets of the old company. The agreement provided that the authorized capital of the new company was to consist of 180,000 shares of common stock and 10,000 shares of convertible preference stock, both without par value, and the Bankers were given the option and privilege of purchasing the 40,000 shares of convertible preference stock and 40,000 shares of the common stock for $1,000,000. (R. 5–6.)

Pursuant to this agreement, the respondent corporation was thereafter organized (R. 6).

On September 17, 1928, all stockholders of the old company executed instruments appointing Nelson and one Gallagher their attorneys in fact to vote the stock of the old company at a special stockholders' meeting to be held on September 27, 1928, and to receive all dividends declared by the old company by way of liquidation or otherwise; to sell or dispose of for the stockholders all assets so received, including all or any part of the shares of stock of the new company accruing to them or to which they were or might become entitled by reason of any such reorganization. The attorneys in fact were directed by the instruments to sell and dispose of any or all such shares of stock in consummating the previous agreement between Nelson and the Bankers. Each instrument recited that in consideration of Nelson having made an agreement or agreements with the Bankers for the benefit of all stockholders of the old company in reliance upon their promise to execute and deliver "this proxy and power of

attorney", it should continue in effect until November 15, 1928, and be irrevocable. (R. 8.)

On September 27, 1928, respondent entered into an agreement with the old company whereby it was provided that all assets of the old company should be conveyed to respondent, which would assume all the liabilities of the old company, in consideration for the delivery by respondent of 140,000 shares of its common and 34,538 shares of its convertible preference stock to the stockholders of the old company, who (the agreement recited) had agreed among themselves that they would contribute all their convertible preference stock and 40,000 shares of their common stock for sale and delivery to the Bankers under the agreement of June 22, 1928, between Nelson (acting as agent for all of the stockholders) and the Bankers; that in order to carry out the plan, "whereby the stockholders of the Old Company will sell and deliver to the said Bankers" the 74,538 shares, each stockholder had appointed Nelson and Gallagher his attorneys in fact to receive the "securities" in respondent to which such stockholder might be entitled, and to receive the purchase price for such shares and distribute to the stockholders the proceeds of sale, after deducting all expenses. (R. 6–7.) The agreement further recited that respondent (R. 7)—

> in making delivery to the stockholders of the Old Company of the shares of stock agreed to be delivered as consideration for the ac-

> quisition of the property and assets of the Old Company shall issue such certificates in such names and for such amounts as shall be specified in the joint order of the said H. E. Nelson and W. N. Gallagher, the attorneys in fact for each of the stockholders of the Old Company, and deliver the same to said attorneys in fact, and certificates evidencing 34,538 shares of convertible preference stock and 40,000 shares of common stock shall be delivered by said attorneys in fact to or upon the order of Folds, Buck & Co., upon receipt of the sum of $868,912.00 * * *.

The agreement then recited that thereupon the $868,912 should be distributed proportionately among the stockholders, after deduction of expenses. (R. 6–8.)

On October 1, 1928, the old company transferred to respondent all assets and properties subject to all liabilities, and respondent thereupon issued certificates for 100,000 shares of its common stock to the individual stockholders of the old company in proportion to their holdings in the old company; certificates for 40,000 shares of common stock to Nelson, pursuant to the aforesaid powers of attorney (of which 7,069 shares were Nelson's pro rata portion as a stockholder of the old company); and certificates for 34,538 shares of its convertible preference stock to Nelson, pursuant to the aforesaid powers of attorney (of which 6,104 shares were Nelson's pro rata portion as a stockholder of the

old company). Nelson thereupon transferred to the Bankers the 40,000 shares of common and 34,538 shares of preference stock, collected the proceeds therefor, and made distribution thereof among the stockholders of the old company. (R. 8–9.) The remaining 40,000 shares of authorized common stock were to remain in respondent's treasury (R. 6). Gallagher did not act with Nelson in the transaction. Nelson acted alone. (R. 11.)

Respondent duly paid the stamp tax on the original issue of 140,000 shares of common and 34,538 shares of preference stock. It also paid the stamp tax on the subsequent transfer by Nelson to the Bankers of the 40,000 shares of common and 34,538 shares of preference stock. (R. 9.)

Thereafter, two additional stamp taxes were demanded and collected from respondent, one of $4,020.46 on the transfer by the old company to its stockholders of its right to receive from respondent 140,000 shares of common and 34,538 shares of preference stock, and one of $1,593.63, including interest and penalty, on the transfer by the stockholders of the old company to Nelson of their rights to receive the 40,000 shares of common and 34,538 shares of preference stock for which certificates were issued by respondent in the name of Nelson for transfer and sale to the Bankers. (R. 9.)

The validity of the $4,020.46 tax on the transfer by the old company to its stockholders of its right to receive the 174,538 shares of respondent's stock was conceded in the court below and claim there-

for abandoned by respondent, on the authority of *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60. (R. 9, 12.)

On June 12, 1931, respondent filed a claim for the refund of $1,593.63, representing the tax on the transfer by the stockholders to Nelson with respect to the 40,000 shares of common and 34,538 shares of preference stock. The claim was rejected by the Commissioner on November 10, 1931 (R. 9–10).

Suit was brought in the Court of Claims on October 14, 1933 (R. 1), and on June 1, 1936, judgment was entered for respondent in the amount of $1,593.63, with interest (R. 13).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the transfer by the stockholders of the old company to their nominee of their right to receive stock in the new company was not subject to the stamp tax imposed by the Revenue Act of 1926.

2. In failing to hold that the transfer to Nelson of the stock ultimately sold to the Bankers was a taxable transfer under the statute.

3. In holding that respondent was entitled to recover $1,593.63, with interest, and entering judgment for respondent in said amount.

SUMMARY OF ARGUMENT

There was a taxable transfer by the stockholders of the old company to their attorney-in-fact of legal

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title to, or rights to receive, shares of stock and certificates therefor in the new corporation.

Under the corporate agreement of September 27, 1928, there accrued to the old company the right to receive all the shares of stock to be issued by respondent as consideration for its assets. By the same instrument, that right to receive the shares, and to become stockholders, was transferred to the stockholders of the old company. Immediately upon conveyance of the assets of the old company to respondent, the stockholders of the old company were vested with legal title to, and/or the right to receive, such stock and certificates evidencing the stock. This is recognized in the agreement itself and in the concession of respondent in the court below that there was a transfer by the old corporation to its stockholders of the right to receive shares of stock within the decision in *Raybestos Manhattan Company* v. *United States,* 296 U. S. 60.

The stock and rights so vested in the stockholders were transferred by them to their attorney-in-fact. As part of the plan of reorganization, the stockholders had agreed to sell and deliver a portion of the new shares to a firm of bankers. To carry out this purpose the stockholders directed the issuance of part of the stock in the name of an individual designated by them, who was directed by them to execute the sale and make distribution of the proceeds to the stockholders. By directing the issuance of the stock and certificates in the name of their attorney-in-fact, the

stockholders transferred to him legal title to, and/or their rights to receive, the stock and certificates therefor. Should the nomination of such attorney-in-fact, without more, be deemed insufficient to effect a taxable transfer, the subsequent issuance of the certificates to such attorney effectively completed the transfer of the stockholders' rights and title.

ARGUMENT

Section 800, Schedule A–2 of the Revenue Act of 1926, imposes a stamp tax on the original issue of shares of corporate stock. By Section 800, Schedule A–3, a like tax is laid—

> On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, *whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not,* * * *. [Italics supplied.]

Section 800 imposes liability for the tax upon the transferor, the transferee and the corporation whose stock is transferred. *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, 61.

Respondent corporation was organized in 1928, to take over the assets and business of its predecessor, the Automatic Electric Washer Company, in consideration for the delivery of 174,538 shares of its capital stock to the stockholders of the old company. As the result of a special meeting of all stockholders, represented by their proxy to Nelson, the old company on September 27, 1928, entered into a written agreement with respondent, pursuant to which on October 1, 1928, all assets of the old company were conveyed to respondent, which assumed all liabilities of the old company.

In addition to the original issue tax paid under Schedule A–2, two transfer taxes were collected under Schedule A–3, one on the transfer by the old company to its stockholders of its right to receive the shares, and one on the transfer from the stockholders to Nelson of their rights to receive part of the shares. The correctness of the first of these two taxes has been conceded by respondent (R. 9, 12). Only the last-mentioned tax is here in issue.

We contend that the Commissioner's determination was correct as to 61,365 of the 74,538 shares for which certificates were issued to Nelson, for the reason that there was transferred from the stockholders to Nelson their legal title to and/or their rights to receive such shares, and certificates therefor. We make no contention with respect to the 13,173 shares representing Nelson's own proportionate interest as a stockholder of the old company. (R. 13.)

Respondent apparently contends (Br. in Opp. pp. 2–3) that the stockholders never acquired a right to receive the 61,365 shares for which certificates were issued to Nelson; that, in fact, such rights had been relinquished by the powers of attorney executed by the stockholders on September 17, 1928; and that therefore the stockholders did not transfer and could not have transferred any rights within the purview of Schedule A–3. We submit that this argument is answered by the terms of the powers of attorney and the corporate agreement, by the concession of the respondent properly made in the court below, and by the scope of the stamp tax provisions as set forth in *Raybestos-Manhattan Company* v. *United States,* 296 U. S. 60.

1. Every arrangement in the reorganization as planned and executed shows a meticulous regard for the fact that the stockholders had a right to receive the stock and transferred that right to their nominees.

The documents executed by the stockholders on September 17, 1928 (R. 8) appointed Nelson and Gallagher attorneys in fact for the stockholders, and conferred on them certain powers and duties. After conferring power of attorney to vote at the stockholders' meeting on September 27, 1928, the stockholders by these powers of attorney authorized and directed Nelson and Gallagher, in consummating the agreement between Nelson and the bankers, to sell certain shares of stock accruing to the stockholders or to which they were or might become en-

titled (R. 8). These powers of attorney, so far from constituting a relinquishment by the stockholders of the right to receive shares of stock, affirmed that right and undertook to confer upon the individuals selected by the stockholders themselves powers whose very existence depended upon a transfer of rights to them by the stockholders.

That the stockholders acquired the right to receive the shares in question and transferred their rights to their nominees is also the clear import of the subsequent agreement of September 27, 1928 between the old and new corporations.

The agreement executed September 27, 1928, expressly provided (R. 6–7):

> As consideration for such conveyance of said property and assets, the New Company *shall deliver to the stockholders of the Old Company* the following securities of the New Company:
>
> | | |
> |---|---|
> | Convertible Preference Stock (without any nominal or par value) | 34,538 shares |
> | Common Stock without nominal or par value | 140,000 " |
>
> Immediately upon the conveyance of all of the assets of the Old Company to the New Company, the stockholders of the Old Company shall be in control of the New Company * * * [Italics supplied.]

The agreement recited that, "as a part of the plan of reorganization, the stockholders of the Old Company have agreed among themselves that each will contribute" certain shares received by him in the new company, and that the shares so contrib-

uted (74,538) shall be sold and delivered to the Bankers, under the provisions of an agreement dated June 22, 1928, between Nelson, acting as agent for all of the stockholders, and the Bankers. The agreement also provided (R. 7):

> In order to carry out this plan whereby the *stockholders of the Old Company will sell and deliver to the said Bankers* said 34,538 shares of the convertible preference stock and 40,000 shares of the common stock of the New Company, *each of the stockholders of the Old Company has irrevocably constituted and appointed H. E. Nelson and W. N. Gallagher his attorneys in fact to receive the respective securities of the New Company to which such stockholder may be entitled and to make sale of that portion thereof to be contributed by such stockholder* for the purpose of carrying out said agreement of sale with the Bankers and to receive the purchase price for all of said shares of stock so sold and delivered to the Bankers, and distribute to each of the stockholders of the Old Company his proportionate share of the proceeds of such sale, after deducting all expenses of the said attorneys in fact therefrom.
>
> ***Accordingly, the New Company, in making delivery to the stockholders of the Old Company of the shares of stock agreed to be delivered as consideration for the acquisition of the property and assets of the Old Company*** shall issue such certificates in such names and for such amounts as shall be

> specified in the joint order of the said H. E. Nelson and W. N. Gallagher, the attorneys in fact for each of the stockholders of the Old Company, and deliver the same to said attorneys in fact, and certificates evidencing 34,538 shares of convertible preference stock and 40,000 shares of common stock shall be delivered by said attorneys in fact to or upon the order of Folds, Buck & Co., upon receipt of the sum of $868,912.00 (less the expenses to be deducted therefrom). [Italics supplied.]

Thus, by the agreement of September 27, 1928, the old company undertook to dispose and divest itself of all its corporate interests, rights, and accumulations, through a corporate distribution to its stockholders of the entire consideration payable for its assets, by causing respondent to pay and deliver such consideration directly to the stockholders in performance of respondent's obligation to the old company. *Rockefeller* v. *United States,* 257 U. S. 176. Under the agreement, the consideration was not intended to be distributed to the stockholders part in stock and part in cash, but was to be in the form of delivery to them by respondent of all the 174,538 shares in order to effect the stockholders' control over the new company "immediately upon the conveyance of all of the assets of the Old Company". (R. 7.) Such stock control was an express condition of the corporate distribution. In giving effect to the agreement, immediately upon the conveyance to respondent of

the old company's assets, legal title to all the 174,538 shares vested (even though momentarily as to the part in question) in the stockholders, to whom passed the old company's inherent right to receive the stock. *Raybestos-Manhattan Co.* v. *United States, supra.* Neither the issuance nor the delivery by respondent to the stockholders of stock certificates was essential to effect delivery of the stock itself. Certificates, even though required, would merely have evidenced the shares of stock which existed independently thereof. *Pacific Nat. Bank* v. *Eaton,* 141 U. S. 227. And the statute applies as well to "shares" as to "certificates."

Immediately after vesting in the stockholders of legal title to, and the right to receive, respondent's stock, legal title to so much of the stock as was to be sold to the Bankers was placed in Nelson, as a trustee, charged by the stockholders with the duty of transferring the stock to the Bankers, receiving the proceeds and making distribution thereof. Nelson was not appointed by the old company but by its stockholders. And the appointment was irrevocable. Thus, it cannot be contended that the designation by the stockholders of Nelson as their attorney in fact or nominee to receive the stock could have been withdrawn and, therefore, that such designation did not constitute a transfer within the meaning of the Act. It follows that the 61,365 shares received by Nelson as attorney for the other stockholders (thus excluding the 13,173

shares acquired by him as a stockholder) were properly subjected to tax upon the transfer from the stockholders to Nelson of their legal title to and/or their rights to receive such shares and certificates therefor.

2. The argument that the stockholders acquired no right to receive, or legal title to, the shares in question is inconsistent with the concession of respondent below that the tax on the transfer by the old company "to its stockholders" of the right to receive all the shares was valid. (Fdgs. 8, 9, R. 9.) Moreover, the argument finds no support in the opinion of the Court of Claims, which states (R. 12):

> The right to receive the stock of the new company was under the foregoing decision [*Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60] vested in the old company, and upon the transfer of this right *to its stockholders* the old company paid a stamp tax of $4,020.46, which the plaintiff now concedes it may not recover. [Italics supplied.]

3. The instant case falls squarely within the principles announced in *Raybestos-Manhattan Co.* v. *United States, supra.* The generating source of the right to receive respondent's newly issued shares was the conveyance to it of the property of the old company. The new shares could not lawfully be issued to any other than the grantor corporation without its authority, and that authority could not be exercised for the benefit of third per-

sons other than its own assenting stockholders. The agreement of September 27, 1928, embodied the duty on respondent to issue the new shares upon receipt of the property, and at the same time made disposition to the stockholders of the old corporation of the correlative right to receive the stock. Thus, there was effectively transferred to its stockholders the old company's right to receive respondent's stock quite as much as if the several legal relationships of the parties had been established at different times and by separate documents. This conclusion, we submit, is required by the precise holding in the *Raybestos-Manhattan* case.

The stockholders, having obtained the rights to receive all shares by the express action of the old company, also had the power to command the disposition of all or any part of the stock, or of their rights to receive the stock or certificates therefor, which included the right to direct issuance of legal title and certificates for the stock to some other person. The exercise of that right in favor of Nelson called the statute into operation.

The stockholders' rights to receive the stock and legal title thereto were just as effectively transferred to Nelson by the method followed as if certificates for the stock had been first issued to the stockholders and then endorsed and surrendered by them with directions to reissue in the name of Nelson. It cannot be doubted that there would then have been a taxable transfer. What

was said in the *Raybestos-Manhattan* case, *supra,* at 63, is equally applicable here:

> We think that this effective disposition of the right to receive the stock involved a taxable transfer quite as much as if the several legal relationships of the parties had been established at different times and by separate documents. * * * The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements.

4. It may be assumed that Nelson had no beneficial interest in the shares transferred by the stockholders. But there is no requirement in the statute that there be a beneficial interest in the transferee, or even that the right to receive the shares shall be unconditional at the time of transfer. *Founders General Corp* v. *Hoey,* 84 F. (2d) 976 (C. C. A. 2d), pending on certiorari, No. 398, present Term. The statute expressly negatives the requirement of beneficial interest, taxing the transfer "whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not." (Schedule A–3, *infra,* p. 21.) Regulations 71, Article 34 (u) (*infra,* p. 22), similarly provide that "Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock." If Nelson be regarded as a trustee for the stockholders, the transfer is recognized as taxable by Article 34 (c) of Regulations 71, *infra,* p. 22.)

The court below, in its opinion, cites with apparent approval *National Bond & Share Corp* v. *Hoey,* 14 F. Supp. 787 (S. D. N. Y.). That case was overruled by the United States Circuit Court of Appeals for the Second Circuit in *Founders General Corp.* v. *Hoey, supra.* The conclusion reached by the Court of Claims is in accordance with the decision in *Unión Trust Co.* v. *Heiner,* 26 F. (2d) 391 (W. D. Pa.), and the cases following it. These and the instant case are, we believe, in conflict with *Founders General Corp* v. *Hoey, supra,* and with the reasoning of this Court in the *Raybestos-Manhattan* case. These cases are discussed in our brief filed in *United States* v. *A. B. Leach & Co.,* No. 331, present Term; the discussion will not be repeated here, but reference thereto is respectfully made.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the case remanded with directions to enter judgment for respondent only as to the 13,173 shares belonging to Nelson.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
SEWALL KEY,
J. P. JACKSON,
GEORGE H. ZEUTZIUS,
Special Assistants to the Attorney General.

DECEMBER 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, * * * the several taxes specified in such schedule. * * * (U. S. C., Title 26, Sec. 900.)

SCHEDULE A—STAMP TAXES

* * * * *

2. Capital stock, issue: On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents: *Provided,* That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent on each $20 of actual value, or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda

of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: * * * (U. S. C., Title 26, Sec. 902).

Treasury Regulations 71, approved July 7, 1928, promulgated under the Revenue Act of 1926:

ART. 31. *Basis of tax.*—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to shares, or certificates of stock, or of profits, or of interest in property or accumulations in any corporation, joint-stock company, or association, or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

ART. 34. *Sales and transfers subject to tax.*—The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of

profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

* * * * *

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

* * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 330

THE UNITED STATES, *Petitioner*

v.

AUTOMATIC WASHER COMPANY, *Respondent*

ANSWER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JESSE I. MILLER,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1936

No. 330

THE UNITED STATES, *Petitioner*

v.

AUTOMATIC WASHER COMPANY, *Respondent*

ANSWER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondent, by counsel, respectfully prays that the petition for a writ of certiorari be denied for the reasons hereinafter set forth.

The basis for the petition is the allegation that the decision of the Court of Claims conflicts with the decision of the Circuit Court of Appeals for the Second Circuit in *Founders General* v. *Hoey* (not yet reported) which, in turn, is in conflict with the decision of the Seventh Circuit in *A. B. Leach & Co.* v. *United States* (not yet reported), in which the Government has petitioned for certiorari (No. 331, Present Term).

It is true that the decisions of the Second and Seventh Circuits are in sharp conflict. The case at bar, however, turns upon an entirely different question from the one

involved in the *Founders General* and the *Leach* cases and, regardless of the principle to be ultimately established in those cases, the decision of the Court of Claims would have to be affirmed.

In order that this Court may have concisely before it the clear distinction between the question involved in the case at bar and the one involved in the *Founders General* and *Leach* cases, a brief discussion follows.

REASONS FOR DENYING THE WRIT.

The tax in each of the three cases above mentioned was collected under the alleged authority of Schedule A (3) of Title VIII of the Revenue Act of 1926 which, among a variety of other bases, imposed a documentary or stamp tax of 2c per share on the

> "transfer of legal title * * * to rights to receive such shares."

In both the *Founders General* and *Leach* cases, the taxpayers had subscribed for shares of stock in certain corporations and, as such subscribers, had acquired "legal title" to the "rights to receive" the shares thus subscribed for. In each of those cases, the taxpayer instructed the respective corporations to issue the shares in the name of a third person who had no beneficial interest in the shares but who was, in each instance, merely a temporary nominee. The question in those two cases was, as the Government correctly states, whether the issuance of stock to the bare nominee of a person who had the *legal right to receive the shares himself,* constituted a taxable "transfer of legal title" to the "right to receive" such shares under the statute quoted above. The Second Circuit held that it did; the Seventh Circuit that it did not.

In the case at bar, the stockholders of the Automatic Washer Company (who are the alleged transferors) *never had any legal or other right or title to the "right to re-*

ceive'' the shares of stock which they are alleged to have transferred to their attorney-in-fact. *Hence, they did not transfer and could not have transferred ''legal title'' to the alleged ''right to receive'' the stock.* It is therefore immaterial, in the case at bar, whether the transfer to a nominee of ''rights to receive'' stock is taxable or not; for in this case *no legal right or title ever vested in the stockholders.* A brief restatement of the facts will amply disclose this situation.

On June 22, 1928, one Nelson, a stockholder and officer of the old company, entered into an agreement with the ''Bankers'', the substance of which was that the old company would be reorganized and the Bankers given an option to purchase 40,000 shares of new common and 34,538 shares of new preferred stock out of a proposed recapitalization of 180,000 shares of common and 40,000. shares of preferred stock of the new or reorganized company.

On September 17, 1928, Nelson secured from all the stockholders of the old company irrevocable (to November 15, 1928) powers of attorney, the material and identical provisions of each authorizing him, in connection with the reorganization, to

> ''receipt for and receive* * * and to sell, exchange or dispose of, for me in my behalf any and/or all property or assets so received, including all or any portion of the shares of stock or other securities of the New Company accruing to me, or to which I am or may become entitled by reason of the consummation of any plan of reorganization of the affairs of the Old Company and particularly * * * to sell and dispose of any and/or all such shares of stock and/or securities in consummating the agreement or agreements now existing between the said H. E. Nelson and Folds, Buck & Company'' (Tr. p. 8).

On September 27, 1928, the New Company (this respondent) having meanwhile been created, entered into an agreement with the Old Company whereby the Old Com-

pany agreed to sell to the New Company all of its assets in consideration of the New Company's issuing to the stockholders of the Old Company all of its common and preferred stock *with the following important qualification:*

> "In order to carry out this plan * * * each of the stockholders of the Old Company has irrevocably constituted and appointed H. E. Nelson and W. N. Gallagher his attorneys in fact to receive the respective securities of the New Company to which such stockholder may be entitled and to make sale of that portion thereof to be contributed by such stockholder for the purpose of carrying out said agreement of sale with the Bankers * * *.
>
> "Accordingly, the New Company, * * * shall issue such certificates in such names and for such amounts as shall be specified in the joint order of the said H. E. Nelson and W. N. Gallagher, the attorneys in fact * * * and deliver the same to said attorneys in fact, * * *" (Tr. p. 7).

In substance, the New Company acquired all of the Old Company's assets upon its agreement (forthwith executed) to issue 100,000 shares of its new common to the old stockholders and 40,000 shares of new common and 34,538 shares of new preferred to Nelson for ultimate sale to the bankers.

In Raybestos-Manhattan Company v. *United States*, 296 U. S. 60, this Court held that where one corporation sells its assets to another corporation in return for the purchasing corporation's stock, the "right to receive" such stock *belongs to the selling corporation* which has "the power to command the disposition of the shares" and where such selling corporation stipulates that the stock is to be issued directly to third persons, it has nonetheless transferred its primary "right to receive" such stock and has thus incurred a tax liability. Respondent recognized this principle and agreed to the tax on the transfer by the Old Company of its "right to receive" *all* of the new stock of which 100,000 common shares were issued to the old

stockholders and the balance to Nelson. The Government, however, contends that the old stockholders had the "right to receive" *all* of the new stock and that they, in turn, transferred to Nelson their "right to receive" the Bankers' stock, thus incurring an additional tax.

The complete answer to this contention is that, under the rule of *Raybestos-Manhattan,* the stockholders acquired no "right to receive" any stock *except under the agreement of September 27, 1928 between the Old and New Companies.* On September 17, 1928, however, all the stockholders had irrevocably relinquished every claim or right to receive the Bankers' stock and the agreement of September 27th expressly recognized, *as one of the essential conditions of the reorganization,* that the old stockholders had irrevocably waived any claim to receive the Bankers' stock, as such.

Hence, the powers of attorney of September 17th, (which are claimed to be the instruments effecting the transfer of the stockholders' "rights to receive" the Bankers' stock) were at most *mere waivers of any claims that the stockholders might later acquire to receive the Bankers' stock.* They certainly did not effect any "transfer of legal title" to "rights to receive", for no such rights existed on September 17, 1928. The Court of Claims very properly, therefore, said that the Government's argument, reiterated in this Court,

> "overlooks the decision of the Supreme Court in the case of Raybestos-Manhattan Co. v. United States, 296 U. S. 60. *The right to receive the stock of the new company was under the foregoing decision vested in the old company* * * *." (Italics ours)

Respondent's position finds added and directly pointed authority in the decision of the Ninth Circuit in *McLaughlin, Collector* v. *Coos Bay Lumber Company,* 80 Fed (2d) 763. In that case the bondholders of an insolvent corporation transferred title to certain bonds to a bondholders'

protective committee which later succeeded in effecting a reorganization under which the corporation issued to the bondholders' committee shares of new stock in the reorganized corporation in exchange for the old bonds. The Government claimed that these new shares were the property of the old bondholders and that the old bondholders had transferred to the protective committee their rights to receive the new shares, thus subjecting the transaction to a tax under Schedule A(3).

In denying the Government's contention and in holding that no tax was incurred, the Circuit Court of Appeals said:

> "In the instant case, we think the controlling factor is the determination of the *time when the right to receive the stock came into existence.* When the bondholders deposited their bonds, they conveyed to the members of the committee the legal title; * * *. When the plan was approved by appellee, a right to receive stock was vested in the owners of the title to the bonds who would be and were the members of the committee. *And since the right to receive the stock was not vested in the bondholders, they could not transfer such right.*" (Italics ours)

In the case at bar, the old stockholders never became entitled to receive any new shares until after the agreement of September 27th. *Raybestos-Manhattan* v. *United States, supra.* Prior to that time they had all irrevocably agreed that Nelson should receive and sell the Bankers' shares. On September 27th, therefore, the stockholders *had no right or title to the Bankers' shares which was capable of transfer.* In other words, they had already relinquished *"the power to command the disposition of the shares"* which this Court has said in the *Raybestos-Manhattan* case is the criterion of the "right to receive".

It is, therefore, submitted that the question presented in this case is entirely distinct from the one inhering in the *Founders General* and *Leach* cases. In the latter cases,

the question is whether the transfer to a nominee of an *undisputed* right to receive stock is taxable. In the case at bar, the question is whether any "right to receive" *ever existed at all.* This latter question has already been answered by this Court in *Raybestos-Manhattan* v. *United States, supra.*

ERRORS IN THE GOVERNMENT'S PETITION FOR CERTIORARI.

The foregoing position furnished the basis for the taxpayer's argument in the court below. The general question of liability in a so-called "nominee" transaction was there, as here, asserted to be immaterial. While the opinion of the Court of Claims is not as clear upon this point as might be desired, nevertheless, when the foregoing is considered, it seems fairly apparent from the language of the opinion below that the Court agreed with the taxpayer's contention as to the precise question involved. The Government's petition loses sight of this fact in asserting that the question in this case and the *Founders General* and *Leach* cases is the same.

A more obvious error (inadvertent, of course) is found in the Government's "Specification of Errors". Specification 4 on page 7 of its petition recites that the Court of Claims erred "in failing to enter judgment for the United States and *dismissing the petition*".

Of the 34,538 shares of preferred and 40,000 shares of common stock issued to Nelson for sale to the Bankers, 6,104 shares of preferred and 7,069 shares of common stock represented Nelson's individual *pro rata* contribution, as a stockholder of the old company, to the total shares sold to the Bankers. The Commissioner of Internal Revenue held that Nelson had transferred *to himself* his right to receive these 13,173 shares and the tax on these shares is a part of the tax sued for and recovered in the Court of Claims.

Upon the argument of the case below, the Government conceded that no liability was incurred as to these 13,173 shares and confessed judgment as to that portion of the tax. This fact the Court of Claims expressly noted in its opinion. The petition for certiorari, however, overlooks this situation and asserts that the Court of Claims erred in not "dismissing the petition."

CONCLUSION.

Upon the foregoing, it is respectfully submitted that

1. The question in this case is entirely distinct from the one involved in the *Founders General* and *Leach* cases and

2. The precise question has already been definitely settled by this Court in *Raybestos-Manhattan* v. *United States, supra.*

WHEREFORE, it is prayed that the petition for a writ of certiorari be denied.

Respectfully submitted,

JESSE L. MILLER,
Attorney for Respondent.

JAN 5 1937
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 330.

THE UNITED STATES, *Petitioner*

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AUTOMATIC WASHER COMPANY, *Respondent.*

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT.

JESSE I. MILLER,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR THE RESPONDENT.

PRELIMINARY STATEMENT.

This case is one of three to be argued as a group, the other two being *United States* v. *A. B. Leach and Company*, No. 331, Present Term and *Founders-General Corporation* v. *Hoey*, No. 398, Present Term. All three cases involve questions of liability under Section 800, Schedule A(3) of the Revenue Act of 1926 for certain stamp taxes on the transfer of so-called "rights to receive" shares of corporate stock. As will be seen hereinafter, however, the ques-

tion involved in the present case is distinct from the one presented in the other two cases.

Petitioner's citations as to the opinion below, the jurisdiction of this Court and the statutes and regulations involved are correct and are not here repeated.

QUESTION PRESENTED.

Petitioner's brief states somewhat inaccurately the precise question involved. The assets of A Corporation were conveyed to the respondent corporation which agreed to deliver its stock therefor in such names and for such amounts as might be specified by the irrevocable attorney-in-fact for A's stockholders. Pursuant to the direction of such attorney-in-fact, respondent issued certificates for part of the stock in the name of said attorney-in-fact. Did this transaction involve a taxable transfer by the stockholders to their attorney-in-fact within the meaning of Section 800, Schedule A(3) of the Revenue Act of 1926?

SUMMARY OF FACTS.

On June 22, 1928, one Nelson, a substantial stockholder and officer of the Automatic Electric Washer Company, hereinafter referred to as the old company, entered into an agreement with a firm of investment bankers, the substance of which was that the old company would be reorganized and the bankers given an option to purchase 40,000 shares of new common and 34,538 shares of new preferred stock out of a proposed recapitalization of 180,000 shares of common and 40,000 shares of preferred stock of a new or reorganized company.

On September 17, 1928, Nelson secured from all the stockholders of the old company irrevocable (to November 15, 1928) powers of attorney, the material and identical provisions of each authorizing him, in connection with the reorganization, to

"receipt for and receive * * *, and to sell, exchange or dispose of, for me in my behalf any and/or all property or assets so received, including all or any portion of the shares of stock or other securities of the New Company accruing to me, or to which I am or may become entitled by reason of the consummation of any plan of reorganization of the affairs of the Old Company and particularly * * * to sell and dispose of any and/or all such shares of stock and/or securities in consummating the agreement or agreements now existing between the said H. E. Nelson and Folds, Buck & Company." (Tr. p. 8.)

On September 27, 1928, the new company (this respondent) having meanwhile been created, entered into an agreement with the old company whereby the old company agreed to sell to the new company all of its assets in consideration of the new company's issuing to the stockholders of the old company all of its common and preferred stock, *with the following important qualification:*

"In order to carry out this plan * * * each of the stockholders of the old company has irrevocably constituted and appointed H. E. Nelson and W. N. Gallagher his attorneys in fact to receive the respective securities of the New Company to which such stockholder may be entitled and to make sale of that portion thereof to be contributed by such stockholder for the purpose of carrying out said agreement of sale with the Bankers * * *.

"Accordingly, the New Company, * * * shall issue such certificates in such names and for such amounts as shall be specified in the joint order of the said H. E. Nelson and W. N. Gallagher, the attorneys in fact * * * and deliver the same to said attorneys in fact, * * *." (Tr. p. 7.)

In substance, the new company acquired all of the old company's assets upon its agreement (forthwith executed) to issue 100,000 shares of its new common to the old stockholders and 40,000 shares of new common and 34,538 shares

of new preferred or a total of 74,538 shares to Nelson for ultimate sale to the bankers.

Of these 74,538 shares, 13,173 shares were Nelson's own *pro rata* contribution, as a stockholder, to the total shares sold to the bankers. Upon these transactions, as the Court of Claims pointed out (R. p. 12), five separate stamp taxes were paid, viz:

1. On the original issue of all the stock by the new company;

2. On the old company's transfer to its stockholders and Nelson of its right to receive the new company's stock (*Raybestos-Manhattan* v. *United States, infra*);

3. On Nelson's transfer to the bankers;

4. On the bankers' sale to the public; and

5. On the stockholders' alleged transfer to Nelson of their "rights to receive" the 74,538 shares ultimately sold to the bankers.

Respondent makes no complaint as to the first four taxes, this case involving only the correctness of the fifth tax above-mentioned. As to that tax, petitioner now admits that it was improperly collected on the 13,173 shares which Nelson, as a stockholder, personally contributed to the 74,538 shares sold to the bankers and *now concedes that the judgment of the Court of Claims should be affirmed to that extent.* Petitioner contends, however, that, as to the balance of 61,365 shares, the tax was lawfully collected under Section 800, Schedule A(3) of the Revenue Act of 1926.

ARGUMENT.

Schedule A(3) of Section 800 of the Revenue Act of 1926, so far as is here material, imposes a stamp tax of two cents per share on the

> "transfer of legal title * * * to rights to receive such shares."

This Court has heretofore considered this provision in *Raybestos-Manhattan* v. *United States,* 296 U. S. 60. The Government relies upon that case as supporting its position here. We rely upon it as supporting respondent's contention. The court below also relied upon it as supporting its conclusion, as to which the Government seeks this review. Since it is apparent, therefore, that a correct interpretation and application of the *Raybestos-Manhattan* decision should determine the case at bar, it seems proper at this point briefly to analyze its scope and underlying philosophy.

In the *Raybestos-Manhattan* case, a corporation sold all its assets to another corporation, the consideration being the issuance by the purchasing corporation of its stock directly to the stockholders of the selling corporation. This Court held that the old company had, in effect, transferred its rights to receive this stock to its stockholders and had thus incurred the liability imposed by Schedule A(3). For, said this Court, after the conveyance of all its assets to the new company, the *old company alone was entitled to receive the new shares* and for this reason had "the power to command the disposition" of them. The transaction, in legal effect, was no different than if the old corporation had received the new stock and then transferred it to its stockhoders, in which event, a tax would concededly have been incurred. The tax could not be avoided by any procedure that would short-cut or obscure the "several legal relationships of the parties" for, said the Court,

> "The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements."

Thus, in underlying principle, the Court held that *substance* and not *form* should control.

These being the basic principles of *Raybestos-Manhattan,* it is now necessary to apply them to the case at bar and to demonstrate hereinafter that

1. The broad underlying principle of *Raybestos-Manhattan* refutes the Government's contention in the case at bar and that

2. The narrower technical rule of *Raybestos-Manhattan* likewise defeats the Government's claim. The stockholders never acquired any "right to receive" the bankers' stock and could not have transferred "legal title" to a non-existant right.

The Underlying Principle of Raybestos-Manhattan Refutes the Government's Contention.

As seen above, the broad principle announced by this Court in the *Raybestos-Manhattan* case is that, in transactions of the sort here involved, short-cutting cannot be permitted to obscure the "several legal relationships" that would have been more clearly established by separate transactions and hence that the application of the tax must turn upon the *substance* rather than the *form* of the transaction.

What, then, was the alternative (and more elaborate) procedure that might have been pursued in the case at bar and what would have been the effect of such alternative procedure?

If the "several legal relationships", which the Government contends existed in the case at bar, had been established by separate transactions, the procedure would have been as follows:

1. Each stockholder would have received two stock certificates, *each in his own name*, one certificate representing shares to be retained by him and the other certificate representing shares to be sold to the bankers.

2. Each stockholder would then have turned over to Nelson, his attorney in fact, an individual certificate in his own (the stockholder's) name, representing the bankers' shares and each of these certificates would then have been endorsed and delivered by Nelson, *as attorney in fact.*

It cannot be contended that any tax would have accrued upon the delivery to Nelson of such individual certificates. Instead, presumably as a matter of convenience, one certificate was issued to each stockholder covering the shares to be retained by him and a single certificate was issued to Nelson, as attorney in fact, this latter certificate covering the total number of shares to be contributed by all the stockholders for sale to the bankers. This is the transaction which the Government claims became taxable under the doctrine announced in *Raybestos-Manhattan*.

In that case, the procedure adopted sought to eliminate one technical transaction which was clearly taxable, i. e., the original issuance of stock to the old company and its transfer thereafter to its stockholders. This Court said that *substance* and not *form* should control and, therefore, sustained the tax, even though the stock had been issued directly to the stockholders.

In the case at bar, the procedure adopted dispensed with a transaction which, *even if it had been gone through with, would have produced no tax.* The Government in this case, however, insists that *form* rather than *substance* should control. This is, indeed, a gross distortion of the doctrine of *Raybestos-Manhattan* and one that is utterly repugnant to the philosophy which underlay the Court's conclusion. The Government's contention here cannot possibly be sustained upon that theory of the *Raybestos-Manhattan* decision.

The Stockholders Never Acquired Any "Right to Receive" the Bankers' Stock and Could Not Have Transferred Legal Title to a Non-Existant Right.

The tax in controversy is imposed upon the "transfer of legal title * * * to rights to receive" shares of stock. It is respondent's contention that, under one of the subordinate principles of *Raybestos-Manhattan*, the stockholders never acquired any "rights to receive" the bankers' stock and consequently could not have transferred to Nelson any

legal title to it. In this respect, the issue is quite different from the one said to exist in the two companion cases to be argued with the present case.

In both the *Leach* and *Founders-General* cases, the taxpayers had subscribed for shares of stock in certain corporations and, as such subscribers, had acquired "legal title" to the "rights to receive" the shares thus subscribed for. In each of those cases, the taxpayer instructed the respective corporations to issue the shares in the name of a third person who had no beneficial interest in the shares, but who was, in each instance, merely a temporary nominee. The question in those two cases was whether the issuance of stock to the bare nominee of a person who had the *legal right to receive the shares himself,* constituted a taxable transfer under the Act.

In the case at bar, as will presently be seen, the stockholders of the Automatic Washer Company *never had any legal or other right or title to the "right to receive" the shares of bankers' stock* which they are alleged to have transferred to their attorney in fact. *Hence, they did not transfer and could not have transferred "legal title" to a non-existant right.* It is, therefore, immaterial, in the case at bar, whether the transfer to a nominee of "rights to receive" stock is taxable or not; for in this case *no legal right or title ever vested in the stockholders.*

In *Raybestos-Manhattan,* this Court held that where one corporation sells its assets to another corporation in return for the purchasing corporation's stock, the "right to receive" such stock *belongs to the selling corporation* which has "the power to command the disposition of the shares" and where such selling corporation stipulates that the stock is to be issued directly to third persons, it has nonetheless transferred its primary "right to receive" such stock and has thus incurred a tax liability. Respondent recognized this principle and agreed to the tax on the transfer by the old company of its "right to receive" *all* of the new stock of which 100,000 common shares were issued to the old

stockholders and the balance to Nelson. The Government, however, contends that the old stockholders had the "right to receive" *all* of the new stock and that they, in turn, transferred to Nelson their "right to receive" the bankers' stock, thus incurring an additional tax.

The complete answer to this contention is that under the rule of *Raybestos-Manhattan,* the stockholders acquired no "right to receive" any stock *except under the agreement of September 27, 1928 between the old and new companies.* On September 17, 1928, however, all the stockholders had irrevocably relinquished every claim or right to receive the bankers' stock and the agreement of September 27th expressly recognized, *as one of the essential conditions of the reorganization,* that the old stockholders had irrevocably waived any claim to receive the bankers' stock, as such.

Hence, the powers of attorney of September 17th, (which are claimed to be the instruments effecting the transfer of the stockholders' "rights to receive" the bankers' stock) were at most *mere waivers of any claims that the stockholders might later acquire to receive the bankers' stock.* They certainly did not effect any "transfer of legal title" to "rights to receive", for no such rights existed on September 17, 1928. The Court of Claims very properly, therefore, said that the Government's argument, reiterated in this Court,

> "overlooks the decision of the Supreme Court in the case of Raybestos-Manhattan Co. v. United States, 296 U. S. 60. *The right to receive the stock of the new company was under the foregoing* decision vested in the old company * * *." (Italics ours.)

Respondents' position finds added and directly pointed authority in the decision of the Ninth Circuit in *McLaughlin, Collector* v. *Coos Bay Lumber Company,* 80 Fed. (2d) 763. In that case the bondholders of an insolvent corporation transferred title to certain bonds to a bondholders' protective committee which later succeeded in effecting a

reorganization under which the corporation issued to the bondholders' committee shares of new stock in the reorganized corporation in exchange for the old bonds. The Government claimed that these new shares were the property of the old bondholders and that the old bondholders had transferred to the protective committee their rights to receive the new shares, thus subjecting the transaction to a tax under Schedule A(3).

In denying the Government's contention and in holding that no tax was incurred, the Circuit Court of Appeals said:

> "In the instant case, we think the controlling factor is the determination of the *time when the right to receive the stock came into existence.* When the bondholders deposited their bonds, they conveyed to the members of the committee the legal title; * * *. When the plan was approved by appellee, a right to receive stock was vested in the owners of the title to the bonds who would be and were the members of the committee. *And since the right to receive the stock was not vested in the bondholders, they could not transfer such right.* (Italics ours.)

In the case at bar, the old stockholders never became entitled to receive any new shares until after the agreement of September 27th. *Raybestos-Manhattan* v. *United States, supra.* Prior to that time they had all *irrevocably agreed that Nelson should receive and sell the bankers' shares.* On September 27th, therefore, the stockholders *had no right or title to the bankers' shares which was capable of transfer.* In other words, they had already relinquished *"the power to command the disposition of the shares"* which this Court has said in the *Raybestos-Manhattan* case is the criterion of the "right to receive".

Therefore, the question presented in this case is entirely distinct from the one inhering in the *Founders General* and *Leach* cases. In the latter cases, the question is whether the transfer to a nominee of an *undisputed* right to receive stock is taxable. In the case at bar, the question is whether any

"right to receive" ever *existed at all.* This latter question, it is submitted, has already been answered by this Court in *Raybestos-Manhattan* v. *United States.*

CONCLUSION.

Upon all the foregoing, it is believed that the judgment of the Court of Claims should be affirmed in its entirety.

Respectfully submitted,

JESSE I. MILLER,
Attorney for Respondent.

FILED
JAN 8 1937
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1936

No. 330

THE UNITED STATES, *Petitioner*,

v.

AUTOMATIC WASHER COMPANY, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF.

THADDEUS G. BENTON,
Counsel for
Middle States Petroleum Corporation,
as Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MAY IT PLEASE THE COURT:

The undersigned, as counsel for Middle States Petroleum Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae.*

THADDEUS G. BENTON,
Counsel for
Middle States Petroleum Corporation,
as Amicus Curiae.

IN THE

Supreme Court of the United States

October Term, 1936

No. 330

THE UNITED STATES, *Petitioner*,

v.

AUTOMATIC WASHER COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF OF AMICUS CURIAE.

This brief is limited to the contention that, properly construed, the phrase "rights to subscribe for or to receive such shares or certificates" as used in Schedule A, paragraph 3, of the Revenue Act of 1926 means (1) those *rights* of an existing security holder of a corporation to subscribe for *additional* shares of stock in such corporation and, when paid for, to receive such shares, and (2) *rights* of an existing security holder of a corporation *to receive* stock dividends which have been declared.

The undersigned is counsel for Middle States Petroleum Corporation in a suit against the United States pending in the Court of Claims which involves the correct construction and application of the above quoted phrase of the statute,

although the facts in that case are different from the facts in the case at bar.

SUMMARY OF ARGUMENT.

1. The phrase "*rights* to subscribe for or to receive such shares or certificates" is used in the Revenue Act of 1926 (and in the prior Revenue Acts) according to its usual and distinctive meaning in corporation practice, which is its popular, ordinary, commonly accepted meaning—and means (1) *rights* of an existing security holder of a corporation to subscribe for *additional* shares of stock in such corporation and, when paid for, to receive such shares, and (2) rights of an existing security holder of a corporation *to receive* stock dividends which have been declared. The word "*rights*" is similarly used in the statute in its distinctive sense and meaning in corporation practice, and does not mean the plurality of the noun "right" in its broad generic sense, such as an inchoate right, title, or interest for which the government contends. Congress employed those words as above stated, and intended that they be given such meaning.

2. Applicable rules of statutory construction require that the phrase in question be construed according to its usual and distinctive meaning in corporation practice, which is its popular, ordinary, commonly accepted meaning, inasmuch as a different purpose is not indicated. This Court has recognized such distinctive meaning of the word "rights".

I

The Meaning of the Phrase.

When Congress used the words "rights to subscribe for or to receive" with the words "such shares or certificates of stock . . . in any corporation", it is presumed to have used such words in the same category, viz., stock interests in corporations,—not a right in its broad generic sense.

"*Noscitur a sociis*"—it is known by its associates. In corporation practice, and in law, those words have a distinct meaning according to this Court's decision in *Miles* v. *Safe Deposit & Trust Company*, 259 U. S. 247, 252, where it stated that such "right[s] to subscribe" are axiomatic in American corporation law:

> "*The right to subscribe to the new stock* was but a right to participate, in preference to strangers, and on equal terms with other *existing stockholders*, in the privilege of contributing new capital called for by the corporation,—an equity that inheres in stock ownership under such circumstances as a quality inseparable from the capital interest represented by the old stock, *recognized so universally as to have become axiomatic in American corporation law*. Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Atkins v. Albree, 12 Allen, 359, 361; Jones v. Morrison, 31 Minn. 140, 152, 153, 16 N. W. 854; Eidman v. Bowman, 58 Ill. 444, 447, 11 Am. Rep. 90; Humboldt Driving Park Asso. v. Stevens, 34 Neb. 528, 534, 33 Am. St. Rep. 654, 52 N. W. 568; Electric Co. v. Edison Electric Illuminating Co. 200 Pa. 516, 520-523, 526, 50 Atl. 164; Wall v. Utah Copper Co., 70 N. J. Eq. 17, 28, et seq., 62 Atl. 533; Stokes v. Continental Trust Co., 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 78 N. E. 1090, 9 Ann. Cas. 738. Evidently this inherent equity was recognized in the statute and the resolution under which the new stock here in question was offered and issued."

In that decision the Court also spoke of: "ex-*rights*" in referring to values of existing stock after the exercise of "rights" (p. 252); "*right to subscribe* to the new issue was offered to existing stockholders upon the terms mentioned" (p. 251); "the stockholder's *right* to take his part of the *new shares*" (p. 252); "the *subscription right* of itself constituted no gain" (p. 252); "sale of *subscription rights* as represented" (p. 253); "*subscription rights* as an increase inseparable from the old shares" (p. 253); "the *sale of rights* as a sale of a portion of a capital interest" (p. 253); "what would have happened had defendant in

error decided to accept the new shares and pay the issuing price instead of *selling the rights''* (p. 253); ''whether the purchaser exercised his *right to subscribe''* (pp. 253-4).

In that case the question decided was what portion of the proceeds of a sale of the preferential right of existing stockholders to subscribe for shares of a new issue of stock in the same corporation constituted taxable gain, and this Court emphasized the recognition of such rights as axiomatic in American corporation law.

The court judicially knows that in corporation practice and financial circles the word ''rights'' has as significant a meaning as the word ''stock'' or ''bonds''. ''Rights'' are equally as much the subject of ownership as are shares of stock. They are generally evidenced by certificates either in bearer or other transferrable form and issued with or affixed to certificates of stock or bonds of a corporation, or directly to existing security holders, entitling the owner to purchase additional shares at a fixed price in proportion to his present holdings in the corporation, at his option, or to receive stock dividends. They are traded actively on the security exchanges and ''over the counter''. Such is the property—the instruments—referred to by Congress in this statute as ''rights''. This is confirmed by the definitions of lexicographers and eminent textbook and encyclopedia authors, amongst which are:

Funk & Wagnall's New Standard Dictionary (Ed. of 1917), page 2115, defines the word ''right'' as used in finance as follows:

> ''RIGHT, *n.* * * * 7. *Finance.* A stockholder's privilege to purchase *new stock in a corporation at a special* price * * *'' (Italics ours.)

Webster's New International Dictionary, Second Edition G. & C. Merriam Co., 1935, defines the word ''right'' as follows:

> ''right, *n.* * * * 6. *Finance.* A privilege to the stockholders of a corporation to purchase proportionate

amounts of a new issue of securities, generally at par or at a price below that prevailing in the market; also, the negotiable certificate evidencing such privilege. *Frequently pl.* * * * " (Italics ours.)

Fletcher's Cyclopedia Corporations—Permanent Edition (1933)—Volume 19, (Section 8907. *Stock purchase warrants*), page 64, defines the word "rights" in the singular sense as follows:

"A 'right' is the privilege given by a corporation to its stockholders, within a named short period of time, to subscribe to a new, or an increased, issue of stock of the corporation in proportion to the present holdings of such stockholder in the corporation, and is not an incident of the sale of any other securities of the corporation."

And at page 155:

"Sec. 8975. *Offer of right of subscription to present stockholders.* So long as discussion is being had of the various methods of issuing stock of the corporation, it might be well to discuss here the method of financing the capital requirements of a corporation already in existence by increasing the authorized capital stock and offering it for subscription to present stockholders, *although that subject has nothing to do with original issues of stock*, which has been the subject under consideration.

"A successful corporation which desires to expand its operations and, in order to do so, must raise additional capital, will often accomplish this by offering to present stockholders *the right to subscribe to an additional* issue of stock at a price somewhat *below the current market price for the same stock. This offer is first made to the stockholders rather than to the public in general* for one or more of three reasons: * * * "

Conyington's *Corporation Procedure* (Rev. Ed.) p. 827, makes the following observations concerning "rights":

"In the different stock markets there is a different understanding as to what is meant by the word 'right'.

In New York *a right is understood to represent the interest in the new issue which* inheres in each share of old stock. Thus, in the example given, where the right will be to subscribe for one new share for each two shares of old stock held, the owner of one share of old stock will be considered as having one right, even though it be only to subscribe for one-half share of new stock, and the owner of ten shares will possess ten *rights*. In Philadelphia, however, and possibly in other markets, the word 'right' is considered as applicable to the new stock to be received. The owner of two shares of old stock would have one right and the owner of ten shares would have five *rights*."

Conyington-Bennett-Pinkerton on *Corporation Procedure* (5th printing 1924) describes the usage of the word as follows:

"Sec. 241. *The 'Stock Right'.* When a corporation desires to obtain capital by issuing additional stock, it extends to its stockholders the privilege of subscribing to the new stock, in proportion to their individual holdings, at a price fixed below the market value of the outstanding stock. This privilege of subscribing, technically known as a 'stock right', is evidenced by a formal document or 'warrant', which in appearance resembles a securities certificate.

"Stockholders are permitted to assign or transfer this subscription privilege to others in case they do not care to take advantage of it themselves. Such transfers are made in the open market and as the new stock is offered at less than the market price of the old stock, the rights possess value."

Christy's volume on *The Transfer of Stock* (1929) speaks of subscription rights as follows:

"Sec. 8. *The Creation of Stock Through the Exercise of Subscription Rights.* Stock may be created by allowing the stockholders to subscribe for additional stock to be created by the corporation. In such case, the corporation generally issues subscription warrants which are mailed to stockholders of record on a certain

date. A stockholder wishing to exercise his privilege of subscription presents his warrant, with the subscription price, to the corporation prior to the time when the privilege expires, and the stock called for by the subscription warrant is thereby created. The stockholder may, if he so desires, sell the *rights represented by the warrant,* or he may sell part of them and exercise the balance, and in order that this may be accomplished it is generally provided in the warrant that the warrant may be split up and new warrants aggregating the rights represented by the old warrant issued, upon surrender of the old warrant to the corporation. If the stockholder sells his warrant, the stock will be created in the name of any person presenting the warrant duly endorsed by the registered owner. In such a case the corporation, or its transfer agent, *must see that a stock transfer tax is paid if the law under which the transfer is made imposes such a tax on the transfer of a right to subscribe to stock.*"

Glen G. Munn, *Encyclopedia of Banking and Finance:* New York, the Bankers Publishing Company, 1935, Volume 1, p. 632:

"RIGHTS

"A term to denote the privilege given to a stockholder to subscribe to additional stock of the same or another class or to bonds of the same company, or to convert bonds into stock, at a certain price. Usually the term refers to the privilege accorded a stockholder of subscribing for more stock of the class, at a price below the market, or on such favorable terms as to make the privilege valuable. When a corporation desires to increase its capital stock, it is customary to give its stockholders of record the preference, of subscribing to the additional shares to be issued over the general public, and in amounts proportional to the number of shares already held.

"The privilege attached to one share of stock held of subscribing to the new, regardless of the ratio which the original stock bears to the new, is called one right. The privilege must be exercised within a limited option period, and when the right to subscribe for the new

stock expires, the original stock is said to be "ex-rights."

"*Rights are assignable,* and if the holder of stock with rights does not wish to exercise his rights to purchase new shares, *he may sell and transfer them to another. Each stock exchange deals in the rights which may be attached to* shares traded thereon."

If Congress had intended any broader meaning of the words and phrase employed, it would not have used the word "right" in its plural sense—the phrase would have been formed as follows: "Or to *the right* to subscribe for or to receive such shares or certificates." The use of the plural sense manifestly shows the intent to speak of "rights" as used in corporation parlance where it has a well defined and understood meaning. This is inescapable because the statute requires that there be a "transfer of legal title . . . to rights", and there is not usually an existing legal title to a "right" as otherwise used in its broad, general sense, as contrasted with stock "rights" as used in corporation practice, to which rights there is always legal title by reason of the ownership of and title to shares already issued.

These words were first included in the Revenue Act of 1918 (c. 18, Title XI, 40 Stat. 1057). A search has been made of the reports of the Congressional Committees for an explanation of the meaning intended for the words and phrase in question, but no specific explanation was given. Therefore, the courts are limited to the common and ordinary usage of the words and phrase in ascertaining the intent of Congress.

The report of the Senate Finance Committee on the "Revenue Bill of 1918" (H. R. 12863) was Senate Report No. 617. At page 18, under the heading "Title XI.—Stamp Taxes," it is stated that "no changes of importance were made in this title." The report of the Ways and Means Committee (House Report No. 767) contains the statement that—

"The bill reenacts the stamp tax provision of the revenue act of 1917 without changing the rates except in one instance."

In order to show at a glance the similarity of the provisions of the corresponding provisions of the Revenue Acts of 1917 and 1918 (which latter is identical with the Revenue Act of 1926), the two paragraphs are printed in parallel columns, showing in italics the provisions in one that are not in the other:

1917 Act	*1918* *1926 Acts*
SCHEDULE A.	SCHEDULE A.
4. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales, or deliveries of, or transfers of legal title to shares or certificates of stock in any *association, company or* corporation	3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales, or deliveries of, or transfers of legal title to shares or certificates of stock *or of profits or of interest in property or accumulations* in any corporation *or to rights to subscribe for or to receive such shares or certificates.* *

The report of the Commissioner of Internal Revenue, dated October 15, 1919, appended to Annual Report of the Secretary of the Treasury on The State of The Finances for the fiscal year ended June 30, 1919, Washington, 1920, (p. 1103), explaining the changes made in the statute in

question, has only the following statement concerning the changes made:

Revenue Act of 1918

> "The stamp tax provisions of the new law are the same as they were in the 1917 act, except that under the new law * * * issues and transfers of certificates of profits or of interest in property or accumulations in any corporation are taxed the same as issues and transfers of stock; * * *"

Thus, while no explanation was made anywhere of the significance of the addition to the law of the words "rights to subscribe for or to receive", it is plain that the Commissioner of Internal Revenue understood that the words "rights to subscribe for or to receive such shares or certificates" did not materially increase the objects taxed, or he would have mentioned same significantly. This confirms the report of the Senate Finance Committee that "no changes of importance were made in this title."

It is evident from the foregoing columnar comparison that the phrases added to the 1918 Act were inserted to supply the deficiency theretofore existing by reason of the fact that the 1917 Act taxed the sale or transfer of only *shares or certificates of stock;* and that the added words were intended to cover "*certificates* * * * to rights" as commonly known in corporation practice, and "certificates * * * of profits or of interest in property or accumulations," such as "rights", or as stock dividends issued by corporations to existing stockholders, as referred to in *Eisner* v. *Macomber,* 252 U. S. 189, in which case stock dividends were held not income under the Sixteenth Amendment. The significance of this analogy is manifest when it is noted that the above quoted report of the Commissioner is dated October 15, 1919, that *Eisner* v. *Macomber* was first argued April 16, 1919, was on May 19, 1919, restored to the docket for reargument, was reargued October 17 and 20, 1919, and decided March 8, 1920, and that when it became

evident that Congress could not tax "stock dividends", as income, plans were made to tax transfers of "rights" to such dividends. The foregoing conclusion is in consonance with the statement of the Senate Finance Committee that "no changes of importance were made in this title" by the Revenue Act of 1918,—for certainly if "rights" were intended to be used in such broad sense as government counsel contends the Senate Finance Committee would not have belittled the significance of the changes made or described them as unimportant, and the Commissioner would have explained it in his official report.

This meaning of the phrase "rights to subscribe for or to receive" is manifestly the underlying reason why the courts have so uniformly refused to approve the construction of the phrase urged by the government, even though such reason was not expressly stated.

Statutes levying taxes are construed most strongly against the government and in favor of the citizen, and a tax will not be sustained unless liability is clearly established by the language employed in the statute, which must not by implication be extended beyond the clear import of the language used. If there be any doubt it must be resolved in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151; *U. S.* v. *Merriam*, 263 U. S. 179; *Old Colony R. Co.* v. *Com. of Int. Rev.*, 284 U. S. 552, 561-2; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 93.

It is respectfully submitted that the true meaning of the phrase in question, as above shown, must control; and that the phrase was not intended by the legislature to be used in such a broad general sense as applied by the Court in *Raybestos-Manhattan, Inc.* v. *U. S.*, 296 U. S. 60. If Congress had intended such broad general meaning of such an elastic word of speech, it would not have chosen the word so circumscribed as the noun employed [rights].

II

The Rules of Statutory Construction.

Popular, ordinary, commonly accepted meaning which the phrase bears in corporation practice controls, in the absence of the manifestation of a contrary legislative intent:

> *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327; *Lang* v. *Com. of Int. Rev.*, 289 U. S. 109, 111; *Reinecke* v. *Smith*, 289 U. S. 172, 174-5; *U. S.* v. *Kirby-Lumber Co.*, 284 U. S. 1, 3; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508; *Old Colony R. Co.* v. *Com. of Int. Rev.*, 284 U. S. 552, 560; *A. Magnano Co.* v. *Hamilton*, 292 U. S. 40, 46-47; *Avery* v. *Commissioner of Int. Rev.*, 292 U. S. 210, 214; *Sproles* v. *Binford*, 286 U. S. 374, 393.

The rule *ejusdem generis*, requiring general words to be assimilated to the particular words, is particularly applicable here. *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 88, 89; *Gooch* v. *U. S.*, 297 U. S. 124, 128.

Where legislation on a particular subject [sales and transfers of capital stock] consists of a system of related general provisions indicative of a settled policy, new enactments [the amendment to the Revenue Act of 1918] of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, unless a different purpose is plainly shown. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 396; *U. S.* v. *Arizona*, 295 U. S. 191; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345.

Words and terms are intended to convey the meaning they have in corporation practice, or in such industry or field where they have a well defined meaning. *Roberts* v. *Tennessee Coal, Iron & R. Co.*, 255 Fed. 469 (C. C. A.), certiorari denied 250 U. S. 659. As the commercial designation and meaning in cases involving import duties: *Arthur* v. *Lahey*, 96 U. S. 112; *Worthington* v. *Abbott*, 124

U. S. 434; *Robertson* v. *Salomon*, 130 U. S. 412; *Pickhardt* v. *Merritt*, 132 U. S. 252; *U. S.* v. *Baruch*, 223 U. S. 191. The language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown. *Sevan* v. *Arthur*, 103 U. S. 597; *Hedden* v. *Richard*, 149 U. S. 346; *Maddock* v. *Magone*, 152 U. S. 368.

CONCLUSION.

It is accordingly submitted that the judgment below should be affirmed, even if it requires a departure from the construction of the statute in *Raybestos-Manhattan, Inc.* v. *U. S.*, 296 U. S. 60.

It is also respectfully suggested that in the *Raybestos* case the Court, while recognizing that the statute requires the transfer of *legal title* to "*rights* * * * to receive," omitted to apply that requirement to the facts involved. The decision holds that the "power to command the disposition of the shares included the right to receive them," but the Court did not find or assume that the two merging corporations had *legal title* to that right. The decision states:

> "We think that this effective disposition of the right to receive the stock involved a taxable transfer quite as much as if the several legal relationships of the parties had been established at different times and by separate documents. It is not doubted that there would have been a taxable transfer if each corporation had conveyed its property to petitioner in exchange for its shares of stock to be issued as the grantor might direct, and had later ordered the certificates to be issued to its stockholders. The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements. But we do not discern even a technical difference of any significance between such a transaction and that now before us, where the same duty to issue the stock is created and the same shift of the beneficiaries of it is effected simultaneously in a single document. *No convincing reason is suggested*

why the Act should be thought to tax the one and not the other.'' (Italics ours.)

It is respectfully suggested that in that case the merging corporations never possessed legal title to "rights to receive" the stock of the new corporation, as legal title is known in law, for the reason that legal title to property is created by the contracts and conveyances of men, judgments of courts, and the like, whereas in that case one of the necessary parties to the contract (the new corporation) did not agree that the two merging corporations should ever have the right to its stock.

It is further respectfully suggested that a consideration of the words "legal title" in their commonly accepted meaning demonstrates the merit of the construction of the words "transfers of legal title * * * to rights to subscribe for or to receive such shares or certificates" as contended hereinabove by the *amicus curiae.*

Respectfully submitted,

THADDEUS G. BENTON,
Amicus Curiae.

January, 7, 1937.

MAR 4 1937
CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 330.

THE UNITED STATES, *Petitioner,*

v.

AUTOMATIC WASHER COMPANY, *Respondent.*

RESPONDENT'S PETITION FOR REHEARING.

JESSE I. MILLER,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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RESPONDENT'S PETITION FOR REHEARING.

Because it is believed that the Court has overlooked a fundamental distinction between the principle involved in this case and the two companion cases, this petition is respectfully submitted.

In this case, each stockholder did "nominate and appoint H. E. Nelson and W. N. Gallagher my true and lawful attorneys for me and in *my name, place and stead*" to perform certain acts, as attorneys in fact, among others to

> "receipt for and receive any and all dividends declared of the old company * * * and to sell, exchange or dispose of for me and in my behalf any and/or all property or assets so received * * *". (R. p. 8)

No authority was here conveyed to Nelson to have any stock issued in his own name. His only right was to receive, as attorney in fact, certain new stock in the stockholder's name and to transfer it to the bankers. However, the agreement *between the two companies* provided that the new company should "issue such certificates in such names and for such amounts as shall be specified" by Nelson and Gallagher.

Upon these facts, this Court said, referring to the three companion cases:

> "In each case, the person originally entitled to receive the certificate directed, for his own convenience and purposes, that it be issued in the name of a nominee."

This was true in the *Founders General* and *Leach* cases; in the present case it was not the stockholder, but the old company which authorized the issuance of the stock in Nelson's name. Nonetheless, the Court said (still generalizing as to the three cases that

> "the authorization rendering his (nominee's) holding lawful was received from the taxpayer (here the stockholder). The legality of the issuance of the stock in the names of the nominees rests on the fact that the taxpayers authorized such issuance and granted their nominees the right to receive the stocks entered in their names. The granting of that authority is a transfer of 'the right to receive' within the meaning of the Act." (Parentheses supplied.)

This statement likewise is correct as applied to the *Founders General* and *Leach* cases; in the instant case, the "granting of that authority" did not come from the stockholder, but from the corporation, *whose transfer of its "right to receive" the stock has, without complaint, been taxed.* The decision, as applied to the present case, therefore, imposes a tax upon a *mere power of attorney.*

The Revenue Acts of 1918, 1921 and 1924, while each containing a provision taxing the transfer of "rights to receive" stock, contained a further provision subjecting to a separate tax any

> "power of attorney granting authority to do or perform some act for or in behalf of the grantor, which authority is not otherwise vested in the grantee." (See Title XI, Schedule A (12), Revenue Act of 1918; Title XI, Schedule A (11), Revenue Act of 1921; Title VIII, Schedule A (10), Revenue Act of 1924.)

However, the tax on powers of attorney *was repealed by Section 1200 of the Revenue Act of 1926* and no tax on powers of attorney has since been in effect.

The effect of the generalization in the joint opinion is, therefore, as applied to the instant case, to impose a tax upon a simple power of attorney, the tax on which was specifically repealed in 1926.

WHEREFORE, it is most earnestly urged that the present opinion, so far as it applies to Automatic Washer Company, should be modified and the decision of the Court of Claims affirmed.

Respectfully submitted,

JESSE I. MILLER,
Attorney for Respondent.